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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 81.

THE GULF AND SHIP ISLAND RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE P. HEWES, TAX COLLECTOR OF HARRISON COUNTY, MISSISSIPPI.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

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(17,441.)

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vs.

GEORGE P. HEWES, TAX COLLECTOR OF HARRISON COUNTY, MISSISSIPPI, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This is another of the Mississippi tax suits.

It is an injunction bill filed against Georges P. Hewes, the sheriff and tax collector of Harrison county.

The original bill was divided into seven paragraphs.

Paragraph 1 sets up that a charter was granted the Gulf and Ship Island Railroad Company (hereafter called the

railroad company) on February 23, 1882, in Laws of 1882, pages 849–862.

Paragraph 2 quotes section 18 of said charter as follows:

"Be it further enacted, That in order to encourage the investment of capital in the works which said company is hereby authorized to construct and maintain, and to make certain in advance of such investment, and as a consideration and inducement therefor, the taxes and burdens which the State will and will not impose thereon, it is hereby declared that said company, its stock, its railroads, and appurtenances, and all its property in this State, necessary or incident to the full exercise of all the powers herein granted, shall be exempt from taxation for a term of twenty years from the passage of this act."

Record, p. 2.

Paragraph 3 charges that under said section 18 the railroad company was exempt till February 23, 1902.

Paragraph 4 states that, acting under this charter, a part of the railroad was built from Gulfport, in Harrison county, to Hattiesburg, in Perry county, a distance of 70.22 miles, and in November, 1896, a four-mile branch was built to Handsboro.

Paragraph 5 states that this exemption has never been repealed, but that the Mississippi railroad commission has assessed the property for taxation, and said sheriff is demanding the taxes, $250 for privilege taxes and $1,780.95 for State and county taxes.

Paragraph 6 charges that said tax collector threatens to distrain for said taxes.

Paragraph 7 states that said taxes are illegally demanded, and that an injunction is necessary.

The prayer of the bill is for a temporary injunction, and on the final hearing for a perpetual injunction and for a final decree "that complainant is exempt from taxation on its property, as above described, until the 23d day of February, A. D. 1902."

Record, pp. 2, 3.

The bill was not filed till January 1, 1897, while the injunction was granted on December 28, 1896.

Record, p. 4.

See 1st Smith's Chancery Practice, marg. p. 586.

A demurrer to this bill was filed on February 2, 1897, with only four grounds, claiming—

1st. No equity.

2d. That the bill shows no cause for relief, either in law or equity.

3d. That said section 18 of the charter was a mere gratuity, affording no protection after its repeal.

4th. That the claim of exemption under Acts of 1882, page 861, section 18, was not warranted, permitted, or protected, "the same having been repealed."

Record, p. 6.

The case was taken under advisement to be decided in vacation, and on September 13, 1897, the demurrer was sustained and leave granted to file an amended bill within twenty days.

Record, pp. 7 and 8.

The amendment was filed on September 20th and the demurrer refiled, by consent, on September 27, 1897.

Record, pp. 7, 9, 10.

There was a bill of exceptions to the granting of leave to file this amended bill.

Record, p. 10.

This amendment set up that the said tax collector and also the board of supervisors of the county claimed that the exemption was repealed by the provisions of the Annotated Code of 1892, but the complainant asserted that this was untrue, and also that under section 10, article 1, of the Constitution of the United States it was not within the power of the State to repeal it.

Record, pp. 8, 9.

The chancellor sustained the refiled demurrer and dismissed the amended bill, and an appeal was taken, all on February 10, 1898.

Record, p. 11.

After the case got to the State supreme court there was a written agreement between the parties, made with the written endorsement of the chancellor, filed on April 15, 1899, to the effect that the charter was received and the railroad built in reliance on the case of Mississippi Mills *vs.* Cook, 56 Miss., 40.

Record, p. 14.

The supreme court simply entered a decree of affirmance on May 8, 1899, without rendering any opinion.

Record, p. 15.

The assignment of errors in that court was composed of a single ground—that the chancery court had erred in sustaining the demurrer and dismissing the bill.

Record, pp. 14, 15.

But the Chief Justice, in granting the writ of error in this case, certified to two things:

1st. That the validity of legislation subsequent to said statute of February 23, 1882, was drawn in question as repugnant to section 10, article 1, of the Constitution of the United States, and the validity sustained.

2d. That the validity of statutes in the Annotated Code of 1892 providing for the taxation of railroads was drawn in question as repugnant to the United States Constitution and the fourteenth amendment thereto, as denying the equal protection of the laws, and the validity sustained.

Record, pp. 17, 18.

There are four grounds in the assignment of errors in this court.

The first two reiterate the two grounds certified by the Chief Justice.

The third is that the decree of the supreme court is in favor of an authority exercised by the chancery court which was repugnant to said section 10, article 1.

The fourth is that said decree is in favor of an authority exercised by said tax collector in attempting to deprive of property without due process of law.

Record, p. 22.

NOTE.—This is the first time this fourth ground has been set up or appears anywhere else in the suit, and the second ground in the certificate of the Chief Justice appears nowhere else in the suit.

BRIEF.

This brief is intended as an argument on the jurisdiction of the court on the claim that this is a delay case, proper for damages, and on the merits.

The gist and gravamen of the whole case is centered on one single finding or fact, and that is, that the exemption in controversy was repealed by "the provisions of the Annotated Code of 1892."

This may raise two points, but we think it can properly only raise one. These are:

1st. Whether such repeal raises any Federal question in this case.

2d. If it does, that question is: Was it within the power of the legislature to make the repeal?

These two points are so intimately connected that they may well be argued together.

Now, first, let us get clearly and definitely at what was decided, and what question is before this court.

Paragraph 5 of the original bill states that the exemption has not been repealed, but claims no protection from the Federal Constitution.

Record, p. 3.

The third and fourth grounds of demurrer aver that the exemption is not warranted, permitted, or protected, because it has been repealed.

Record, p. 6.

On sustaining this demurrer the chancellor granted leave to file an amended bill. In this amendment two things, and only two, are set up: First, that it is claimed by the tax collector, and also by the board of supervisors of Harrison county, that the exemption has been repealed by the provisions of the Annotated Code of 1892, which complainant "avers is utterly untrue;" and, second, that the exemption is a contract protected by section 10, article 1, of the Constitution of the United States, and "it is not in the power of the State of Mississippi to repeal the said exemption from taxation."

Record, pp. 8, 9.

The same demurrer was refiled to the bill as thus amended, which was again sustained and bill dismissed and an appeal taken.

In the supreme court a written agreement was filed, with the consent and endorsement of the chancellor, to the effect "that said Gulf and Ship Island Railroad Company was chartered and constructed after the decision of the supreme court of the State of Mississippi in the case of The Mississippi Mills *vs.* Cook, 56 Miss., page 40, and that the incorporators and stockholders invested their money in said enterprise, relying upon the adjudication of the supreme court of Mississippi in said cause as the law."

Record, p. 14.

The assignment of errors simply stated that the court below erred in sustaining the demurrer and dismissing the bill.

Record, p. 14.

And the supreme court simply affirmed the decree of the court below, and rendered no opinion.

Now, we submit to this court that the status of the case here, from the foregoing recitals, is that the complainant railroad company first in its original bill charged that the exemption had not been repealed, and then in its amendment averred that the tax collector and board of supervisors were acting on the assertion that it had been repealed by the provisions of the Annotated Code of 1892, which complainant averred was not true, and then further averred that it was not in the power of the State to repeal it, it being protected by section 10, article 1, of the Constitution of the United States, and then by a further agreement made and filed in the State supreme court before the hearing there it was agreed that the charter was received and road built after and in reliance on the Mississippi Mills case.

The amendment to the bill sets up that the claim of the tax collector is that the exemption had been repealed by the Annotated Code of 1892, and the fourth ground of the refiled demurrer is that the exemption is not permitted because the same has been repealed.

The Annotated Code of 1892 consists, of course, of the general and public laws of the State, of which the courts take judicial notice.

Hence the only question and controversy is thus sharply defined and is a question of law and of judicial cognizance, and that is, first, whether the exemption was repealed by the Code of 1892, and, second, whether, if this be true, the State had the power to repeal it.

Now, if the State had the patent and undisputed power to repeal it, then the other question, as to whether it has in

fact been repealed, is a question of local law and policy and devoid of any Federal features.

Let us examine, then, first, the power of the legislature at the time this charter was granted on February 23, 1882.

Sections 13 and 20, article 12, of the Mississippi constitution of 1869, in force at the time, were as follows:

"SEC. 13. The property of all corporations for pecuniary profits, shall be subject to taxation, the same as that of individuals."

"SEC. 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

Mississippi Mills *vs.* Cook, 56 Miss., 50, 51.

This court in four concurring opinions, and all of the States where the question has arisen, except the State of Mississippi, have held that the same or similar constitutional provisions rendered it impossible for the legislature to grant exemptions. In this respect the constitution of Mississippi is a copy of the Iowa constitution. That this is so, see—

Mississippi Mills *vs.* Cook, 56 Miss., 53.

That this court and all other courts, except that of Mississippi, hold this to be a constitutional interdiction against exemptions, see the opinion, where the cases are collected, in Adams *vs.* Railroad Co., 77 Miss., 254, 274, 275.

And in that case the court says that, on the particular holding, the case of Mississippi Mills *vs.* Cook stands "*absolutely alone.*"

77 Miss., 278.

The court further decides that the Mississippi Mills case cannot be used as *stare decisis*, because the exemption passed

on in that case was to all factories thereafter built, of a certain class, while the exemption in controversy there was to a single railroad corporation by name, and that such kind of exemption was prohibited by the above-quoted provisions of the constitution of 1869.

77 Miss., 278–289.

And this court has not only followed the same rule as to *stare decisis*, as shown in said opinion, but has gone the length of holding that, where the claim of exemption is not the same, a decision against its validity raises no Federal question.

77 Miss., 278.

Wood *vs.* Brady, 150 U. S., 20–22.

We are not quoting the foregoing opinions and decisions in order to show that the exemption in this case was incipiently unconstitutional and void. No such question is either raised or decided in this case and no such question is before this court in this case.

We simply do this to show this court plainly that the Mississippi court in the Mississippi Mills case gave to corporations the most *favorable construction* that has ever been anywhere known in the English-speaking world. We are not intimately acquainted with the laws of other nations.

Then what does the Mississippi Mills case decide? It is solemnly agreed by a written instrument filed in the State supreme court that the railroad company was chartered and road constructed *after and in reliance on the Mississippi Mills decision.*

Record, p. 14.

Now, the facts are that the Mississippi mills was built under the act of April 17, 1873, amending the factory act of April 1, 1872, and in 1877 the legislature passed an act partially repealing the exemptions granted to factories in said act of 1872.

Mississippi Mills *vs.* Cook, 56 Miss., 42–45.

The tax collector was attempting to collect the taxes under this repealing act of 1877, and was enjoined on the express ground that the repealing act "impaired the obligation of such contract, and was in violation of the Constitution of the United States."

56 Miss., 45.

The court sustained the repealing act and held that under said sections of the constitution of 1869 the contract of exemption was repealable, and that the legislature could, at any time, repeal it, and could not make it irrepealable, and the repealing act was sustained and upheld. The sections are quoted in full (56 Miss., 50, 51), and Judge Campbell says these sections are mandatory as to the liability to taxation, "shall always be liable to be taxed," "cannot be placed beyond the reach of the taxing power."

56 Miss., pp. 52–55.

Judge Simrall says there must be a "*continuous* subjectibility to taxation." "If the exemption is granted in the form of a contract in the charter, that is prohibited."

56 Miss., pp. 61, 62.

So if anything is certain it is certain that the Mississippi Mills case, both in its actual facts and in the decisions and

decree, established, beyond all chance for doubt or cavil, that the legislature had power to repeal an exemption granted to a corporation under the constitution of 1869. This has never been doubted, denied, or controverted in the State. In the late case No. 35, October term, 1900, here, there was some attempt made to discriminate between an exemption and an appropriation of taxes, which gave this court jurisdiction, but the thing in this case is in the form of an exemption pure and simple (see Record, p. 2), and no one, anywhere, so far as we know or have ever heard, has ever contended that the Mississippi Mills case did not establish the doctrine that all *exemptions* of corporations for pecuniary profits were necessarily repealable at the will and pleasure of the legislature.

The taxes involved in this case are not *back taxes*, and there is nothing retrospective attempted, but it is the taxes of the current year 1896, and the case here involves the simple question of the power of the legislature to repeal exemptions to corporations for pecuniary profits, unencumbered with any other question whatever.

As we said before, the Mississippi Mills case settles this power beyond controversy, and the solemn written agreement is that the charter was accepted and road built in reliance on the Mississippi Mills case.

Hence it is plain that this court has no jurisdiction, for the simple and plain reason that if the legislature did not repeal it, it didn't, and if it did, it had the right to do it.

Under ordinary circumstances, if the question was *res nova*, this court would take jurisdiction in order to decide whether the repeal of the exemption violated the obligation of the contract; but there is no color for such jurisdic-

tion when the supreme court has already decided that the exemption was repealable, and that in the Mississippi Mills case, in 1878, when the charter in this case was granted on February 23, 1882, and by a solemn written agreement it is admitted that the charter was accepted and road built on the faith of the Mississippi Mills case. What is this court to do? Decide that the Mississippi Mills decision is erroneous? If it does, it must ignore and repudiate the written agreement on which all parties have in open court agreed to stand.

Besides, if this court could do such a thing as that, it must then follow its own decisions and the late decision of the supreme court of Mississippi in the case corresponding to No. 35, October term, 1900, here, reported in 77 Miss., 270–289, and hold that the exemption was void *ab initio*, and we do not suppose there could be found a lawyer anywhere, and certainly no lawyer entitled to be enrolled among the members of the bar of this court, who would seriously contend that the legislature could not repeal a void *ab initio* exemption.

And so it is that all roads lead to Rome, to the right of the State to repeal.

We especially call attention to the fact that in the Mississippi Mills case the protection of the Federal Constitution was expressly claimed, and that the decision establishes the fact that the repeal was valid under it also, and the railroad company agrees to stand on that.

The question of the original invalidity of the exemption is not in issue in this case, has never been made an issue, has never been passed on, is not in either the assignment of errors in the State court or the certificate of its Chief Jus-

tice, nor in the assignment of errors in this court. The gage of battle tendered by the railroad company was accepted by the State, and the battle in this case has been waged and fought out to the end on the proposition that the exemption was repealed by "the provisions of the Annotated Code of 1892," and with the railroad company asserting that this was not true, and claiming that the State had no power to repeal it, with a written agreement that the charter was accepted and road built in reliance on the Mississippi Mills case.

With the first question, as to whether it had been repealed by the Annotated Code of 1892, that is a question of local law and policy with which this court has nothing to do. As to the question of local policy, this court, in the concluding part of its opinion, by Mr. Justice Brown, in No. 35 of the present term, delivered on January 7, 1901, has stated the position of this court in such scholarly and conclusive language that we can add nothing to it. As to the question of local law, this court has so often decided that the supreme court of a State has the absolute right to construe its own constitution and laws on writs of error to the State court that there is no longer room for controversy on this point.

To save space, it is only necessary to refer to the last reported decisions of this court on this point. They are Avery *vs.* Popper, 179 U. S., 305, 315; Board, &c., *vs.* Louisiana, 179 U. S., 636.

In view of this fact, it would seem rather a work of supererogation to refer this court to the recent previous decision of the supreme court of Mississippi in R. R. Co. *vs.* Adams, 77 Miss., 291–293, where it is distinctly held that all railroad exemptions were repealed by sections 3379, 3744,

and 3875–3884 of the Annotated Code of 1892, to which we might add section 3803.

The decision is that the exemption in this case (whether originally void or valid) has been repealed by said provisions of the Annotated Code of 1892.

The only question before this court is, did the State have power to repeal it?

This would clearly present a Federal question if it was *res nova*. The point we make is that it is not *res nova*, and that the railroad company is effectually estopped to claim that it is *res nova* by their solemn admission and agreement that the charter was accepted and road built in reliance on the Mississippi Mills case. All parties agreed to stand on that proposition, and that deprives this court of jurisdiction.

The Mississippi supreme court has since frequently construed the Mississippi Mills case as holding all railroad or corporation exemptions to be repealable.

Attala Co. *vs.* Kelly, 68 Miss., 44.

Railroad Co. *vs.* Lambert, 70 Miss., 786, 787.

In the Attala County case the exemption was repealed, and repeal sustained, and in the Lambert case the exemption was repealed by the Code of 1880 and repeal sustained, the court holding that it was restored by the act of 1884; and that suit being for the taxes of 1891 and 1892, no question was raised or made as to a repeal by the Annotated Code of 1892.

The Mississippi Mills case decided that exemptions were repealable, and the Mississippi supreme court has several times decided that the Mississippi Mills case did hold that

exemptions were repealable. That can be seen with the eyes of a normal person, and read by a blind man with his fingers. Hence it has no color.

It has been so often decided by this court that in order to confer jurisdiction the defense must be made in good faith and present a *bona fide* color of truth and right that it is needless to refer to authorities. They are legion.

Hence we say this case does not present a *bona fide* color of a Federal question or defense, and should be dismissed for want of jurisdiction.

But if the court sees proper to take jurisdiction, it should at least be affirmed and damages awarded as for a delay case, for it is certain that the Mississippi Mills case decided that exemptions were repealable, and that under the pleadings and agreement the Mississippi Mills case is expressly accepted as the law of this case as to the question of the repealability of the exemption.

It is expressly decided by this court that a grant of exemption for twenty or any named number of years is not an agreement not to repeal it within that time, under the rule of *strictissimi juris*, as against exemptions.

Citizens' Sav. Bk. *vs.* Owensboro, 173 U. S., 650.

Louisville *vs.* Bk. of Louisville, 174 U. S., 443, 444.

The evident reason why the State supreme court did not render an opinion was because this case was continued there, by consent, from time to time, awaiting a decision in what was termed the main case, No. 35, October term, 1900, here. This case there was, on April 12, 1898, continued by consent till the October term, 1898. By an agreement filed January 31, 1899, it was again continued till the March

term, 1899, and decided on May 8, 1899, the assignment of errors being filed on April 21, 1899 (Record, pp. 13–15).

In said main case the summary of holdings was handed down on June 20, 1898, and full opinion filed November 22, 1898 (Adams *vs.* Railroad Co., 77 Miss., 205), and opinion on the second appeal delivered on February 20, 1899, as will be seen from the record of that case in this court.

We make these remarks simply to show that this case was continued along to await the decisions in that case, and the court in that case, having decided (77 Miss., pp. 289–293, affirmed on the second appeal, pp. 315–319) that charter exemptions were repealed by the provisions of the Annotated Code of 1892, did not find it necessary to render an opinion in this case, which would have been one of simple reiteration.

Section 181 of the constitution of 1890 has no effect here, it simply providing that "exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature."

And this exemption was "*sooner repealed*" by the Annotated Code of 1892.

Hence we ask this court to dismiss, or, if that cannot be done, to affirm with damages as a delay case, or take such action as is legal and proper under the laws and decisions of Mississippi.

FRANK A. CRITZ,
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Attorneys for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 5.

THE GULF AND SHIP ISLAND RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE P. HEWES, TAX COLLECTOR OF HARRISON COUNTY, MISSISSIPPI, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR IN ANSWER TO BRIEF FOR PLAINTIFF IN ERROR, FILED OCTOBER 4, 1901.

There is a full but succinct statement of the case in our original brief, filed with the motions to dismiss or affirm, and also a general argument, to which we invite the attention of the court.

We shall confine ourselves in this reply brief mainly to a single point, and in the argument of this point will meet the views put forward by opposite counsel.

Those that are not so met we will notice here separately.

It seems that the plaintiff in error has new counsel em-

ployed, or, at least, that this case is now being attempted to be pressed on grounds that were not advanced or passed on in the lower courts; and in the course of this brief we will endeavor to show that this is not admissible.

For instance, it is now brought forward for the first time that the charter in controversy is in some sort an amendment or continuation of an old charter passed in 1854, but to this contention there are several answers:

First. The bill in this case claims under the new charter of February 23, 1882, and a party cannot raise a Federal question here not raised in the lower court.

Second. The bill expressly states that the corporation that is suing here was incorporated on February 23, 1882, and that it built the railroad, and that the exemption is claimed under the eighteenth section of its charter.

Record, p. 2.

In his Appendix, pages 2 to 4, plaintiff in error copies an old charter of 1854, and the charter in this case is copied on pages 8 to 10. The exemption in that old charter is in section 11, and the bill in this case makes no reference to it and claims nothing under it. The incorporators in one are totally distinct from those in the other.

Third. The charter of 1882 is an entirely new one, and there is no reference in it to any other charter. It is true that an amendatory act in section 8, copied in their Appendix on pages 13 to 14, gives the company chartered in 1882 "all the rights and privileges heretofore granted by the State of Mississippi to the Gulf and Ship Island Railroad Company, but does not specify which company, and the fatal defect is

that this last act was passed on March 13, 1884, nearly two years after the new Gulf and Ship Island Railroad Company was incorporated; and it is plain that if the legislature in 1882 could not grant an exemption, or an irrepealable exemption, it could not accomplish this result two years after the creation of the new company, by the indirect method of giving it the rights and privileges of another company. This would be as much forbidden by the Constitution of 1869 as an original grant; and if section 18 of its own charter was invalid, section 8 of the amendatory act would be equally so.

Planters' Ins. Co. *vs.* Tenn., 161 U. S., 197, 198.

Fourth. This amendatory act of 1884 only confers "the rights and privileges" of another company, and this is held by this court not to include an exemption from taxation unless the word "immunity" is used, or there be some other indication of an intention to pass an exemption; and certainly it could not be implied that the words "rights and privileges" were here intended to include a short exemption till the road was completed, when section 18 of the charter proper had given a much longer exemption of twenty years.

Phœnix Ins. Co. *vs.* Tenn., 161 U. S., 174, 177–183.

Fifth. There is nothing in the bill to show that the company has not completed all the road it intends to build, or that the old Gulf and Ship Island Railroad Company was ever organized or ever built any railroad, or that that charter was ever accepted or acted on by anybody, and a corporation has no existence till organized; and, besides, section 180 of the constitution of 1890 makes null and void all exist-

ing charters under which organizations have not taken place and work commenced within one year after its adoption. In fact, there is nothing whatever to connect the plaintiff in error, chartered in 1882, with an old obsolete charter enacted in 1854. That whole business seems to be an afterthought injected into the case by the new counsel, and which has no existence in the pleadings or the case, and hence cannot be considered, but is, for reasons above set forth, within itself utterly untenable.

Planters' Ins. Co. *vs.* Tenn., 161 U. S., 197, 198.
Y. & M. V. R. R. Co. *vs.* Adams, 77 Miss., 253.
1 Morawetz Priv. Corp., § 288.

We think there is one pivotal and vital point on which the case should turn, and we respectfully invite the closest attention and scrutiny of the court to this point.

THE POINT.

It is this: That the issue, and only issue, which was triable under the pleadings, or which was in fact tried or decided, was whether the exemption set up by the plaintiff in error had been repealed; and the point we wish to press is that if this court, *on its own construction* of the contract, shall decide that it was repealable at the will of the legislature, then the further question whether it was in fact repealed or not was a question of local law, over which the State court had exclusive jurisdiction, and over which this court has no jurisdiction, or in which this court, under repeated rulings, is bound by the decision of the State court, and hence must dismiss or affirm.

THE ISSUE.

What was the issue? It must be borne in mind that this was a suit in equity in which the plaintiff in error took the initiative. It filed the bill. Hence the issues are necessarily those made by the bill, *so far as the plaintiff in error is concerned.* If the bill had been filed by the State, and the demurrer by the plaintiff in error, other questions might arise. But the bill was filed by the plaintiff in error to enjoin the collection of the State and county taxes for the year 1896, and the tax collector, the defendant in error here and defendant in the lower court, did not answer, but filed a demurrer, in which it is claimed that the plaintiff in error was not entitled to relief on the showing made in the bill, and the demurrer points out the reasons why the bill is insufficient.

The original bill merely set out the attempt to collect the taxes, the exemption, and prayed for an injunction. There were only four grounds of the demurrer, of which the first two were in general terms, stating that the bill showed no equity or cause for relief, and the third and fourth each claimed that the exemption had been repealed, but without naming any repealing statute.

Record, p. 6.

This demurrer was sustained, and leave granted to amend. In the amendment two additional things were set up. These were that it was claimed by the tax collector and by the board of supervisors of Harrison county "that the said exemption from taxation has been repealed by the provisions of the Annotated Code of 1892;" and then the amendment

proceeds to say, "which said contention complainant now avers is utterly untrue;" and also "that it is not in the power of the State of Mississippi to repeal the said exemption from taxation," and "that to permit the State to repeal its contract of exemption so entered into by it would be a violation of the 10th section of article I of the Constitution of the United States," &c.

Record, pp. 8, 9.

To the bill, as thus amended, the original demurrer was refiled by consent, to save the manual labor of writing it out again.

Record, p. 10.

The demurrer was again sustained and the bill dismissed and an appeal taken to the Supreme Court, but before it was argued, or submitted there, a written agreement was prepared and filed that the appeal was to be heard and determined "as if the bill stated and recited the fact that the said Gulf & Ship Island Railroad Company was chartered and constructed after the decision of the supreme court of the State of Mississippi in the case of The Mississippi Mills *vs.* Cook, 56 Miss., page 40, and that the incorporators and stockholders invested their money in said enterprise relying upon the adjudication of the supreme court of Mississippi in said cause as the law," etc.

Record, p. 14.

The case was affirmed by the Supreme Court without any written opinion.

As we have before said, the initiative was taken by the plaintiff in error. It filed the bill, and there is but one Fed-

eral question anywhere attempted to be raised by the pleadings, and that was the averment in the amendment to the bill that it was claimed by the tax collector that the exemption had been repealed by the provisions of the Annotated Code of 1892, and plaintiff claimed that this was utterly untrue, and also claimed the protection of section 10, article 1, of the Constitution of the United States against the legislative impairment of contracts. By written agreement made and filed in the Supreme Court, as aforesaid, this amendment was to be heard and determined as if it had stated the fact that the charter was accepted and road built on the faith of the Mississippi Mills case "*as the law.*"

Now, let us recite some dates.

The bill was prepared and sworn to on October 21, 1896, and filed January 1, 1897. The amendment was filed September 27, 1897. The final decree was made in the chancery court on February 10, 1898.

Record, pp. 4, 8–9, 11.

As shown by the record in Y. & M. V. R. R. Co. *vs.* Adams, No. 35, October term, 1900, here reported in 77 Miss., 205, 307, and 180 U. S., p. 3, the first opinion holding these railroad exemptions unconstitutional was not rendered till June 20, 1898, and hence, so far as the record in this case discloses, the repeal of the exemption is the only thing that was thought of or contended for in the court below. As shown by the record, we were not of counsel in this case in the State courts.

The agreement to which we have referred was filed in the State supreme court on April 11, 1899, and the final decree rendered May 8, 1899.

Record, pp. 14, 15.

At those dates the Supreme Court had decided, on November 22, 1898, in said case, No. 35 here, that these railroad exemptions were unconstitutional, and this agreement seems to have been intended to interpose the Mississippi Mills case as *stare decisis* between such a holding and the charter exemption; but in trying to avoid Scylla they ran into Charybdis, for the Supreme Court had also decided that, whether the exemption was unconstitutional or not, it was repealable and had been repealed.

Y. & M. V. R. R. Co. *vs.* Adams, 180 U. S., 13, 14.
Adams *vs.* Y. & M. V. R. R. Co., 77 Miss., 289–293, 316–318.

We simply call the attention of the court to these things to show that, as a matter of fact, while the Supreme Court might have based, and very probably did base, its simple decree of affirmance on the authority of said previous decision of November 22, 1898, embracing both the unconstitutionality and the repeal of the exemption, still, as this case was framed and decided in the lower court, there was nothing involved by the pleadings, except the repeal of the exemption, and no provision of the Federal Constitution was ever invoked or thought of except that against the impairment of contracts by reason of such repeal. As the plaintiff took the initiative, he made his own bed and, Procrustean though it be, he must lie on it, since in such cases a party can only have the benefit of such Federal questions as he himself raises. They cannot be raised for him by the other party.

Sully *vs.* American Nat. Bk., 178 U. S., 297.
De Lamar, &c., *vs.* Nesbitt, 177 U. S., 528.

In a contention as to the impairment of a contract, however, it is the custom and practice of this court to make its own independent construction of the contract and its obligations, and it is probable that it ought to and will take into consideration the constitutionality of and all laws entering into the contract in order to determine whether such a contract as is claimed in fact existed, because it has laid down the rule that before the Federal prohibition against the impairment of the contracts can be invoked it must first be shown that there is such a contract as is subject to impairment in the manner claimed; and if the alleged contract was either void for unconstitutionality or repealable, then there is no such contract as is subject to impairment by subjecting the property to taxation.

New Orleans *vs.* New Orleans Water Works Co., 142 U. S., 88.

There was but one assignment of error in the Supreme Court, and that was that the court below "erred in sustaining the demurrer and dismissing the bill."

Record, p. 14.

We deny that there is any such practice as only assigning one error on a demurrer in the Supreme Court, as claimed by opposite counsel. We never stopped with one.

In his certificate the Chief Justice certifies that upon the argument and hearing section 10 of article 1 of the Constitution of the United States, against the impairment of the obligation of contracts, was in issue, and also that "statutes of the State of Mississippi in the Annotated Code of 1892, providing for the taxation of railroads, were drawn in ques-

tion" as "repugnant to the Constitution of the United States, and the 14th amendment thereto, in that in and by said statutes the State of Mississippi denies to the said Gulf & Ship Island Railroad Company within its jurisdiction the equal protection of the laws," &c.

This certificate as to this last assertion is fatally defective both because it does not point out what statute or in what manner the plaintiff in error was denied the equal protection of the laws, and for the further reason that it is not in fact borne out by anything in the record. For both of these reasons it should be disregarded.

Yazoo, &c., R. R. Co. *vs.* Adams, 180 U. S., 48, 49.
Henkel *vs.* Cincinnati, 177 U. S., 170, 171.
Lawler *vs.* Walker, 14 How., 149.

It is impossible for this court to tell, either from this certificate or from the record, what particular statute denied or in what way the plaintiff in error ever claimed to be denied the equal protection of the laws. It would be a novel doctrine to hold that a man was denied the equal protection of the laws because his property was subjected to taxation equally and in common with that of his fellow-citizens.

If it refers to the method of assessment, it has been so often and so deliberately decided that a method of assessment like that here violates no provision of the Federal Constitution that we cannot conceive that either the Chief Justice or the learned counsel on the other side referred to that. What does it mean? We are lost in the unsurveyed wilds of conjecture. Possibly opposite counsel can explain it in their briefs or oral argument, if cases on writ of error

to a State court can be tried here in that way. We thought this court tried that class of cases *on the record*. It surely cannot refer to the method, either under the State or Federal Constitution.

Y. & M. V. R. R. Co. *vs.* Adams, 77 Miss., 775 to 779, and Federal cases cited.

Also Kentucky Railroad Tax Cases, 115 U. S., 321.

Weyerhaueser *vs.* Minnesota, 176 U. S., 557, 558.

New York State *vs.* Barber, 179 U. S., 279.

Mallett *vs.* North Carolina, 181 U. S., 597–599.

In passing, we would call the attention of the court to the fact that, so far as the privilege taxes are concerned, the privilege tax in this case was levied by the act of March 17, 1896, and not by the Code of 1892.

Laws of 1896, pp. 31–54, 44, 45.

The concluding section of this act of 1896, page 54, repeals chapter 108, which is the privilege-tax law in the Code of 1892, embracing section 3379, which fixes the privilege tax on railroads.

This would apparently repeal all privilege taxes prior to 1896 which had not been paid; but the privilege tax in controversy here is for the year 1896, and due December 1, 1896, and hence is that levied by this act of March 17, 1896.

Now, the amendment to the bill, as above shown, claims that the repeal by the provisions of the Annotated Code of 1892 impairs the obligation of the contract. This act of 1896 subjects all railroads in the State to a privilege tax without exception or qualification, and there can be no doubt that it embraces the railroad in controversy here.

In another case before this court where the party claimed the protection of the 7th amendment, when he should have claimed under the 14th, one of the judges thought he ought to have the benefit of good intentions, but the court declined to do for the party what he had mistakenly or inadvertently failed to do for himself, although admitting it was a hardship. This court cannot correct mistakes. It cannot assist the negligent or the unfortunate. A certain place is said to be paved with good intentions. We are all liable to err, and however hard it may appear, yet inexorable nature refuses to take the will for the deed, and we must suffer equally as if we had deliberately and knowingly committed the error or the deed.

Chapin *vs.* Fye, 179 U. S., 127, 130.

We say, therefore, that so far as the privilege tax is concerned this court must dismiss for want of jurisdiction, as it is distinct and severable from the *ad valorem* taxes. This is a small matter, and, as the *ad valorem* taxes must still rest on the Code of 1892, we would not even call the attention of the court to it, except that we consider it our duty as members of the bar of this court to do so in order that the court may not be placed in the position of basing its decision on untrue grounds.

At the same time we wish to guard the court against making any deliverance as to the effect of the repeal of chapter 108 on the taxes prior to 1896, not involved in this suit, as there are other cases pending in the State courts. This court holds that where one act is repealed, and another to the same effect passed at the same time, *uno flatu*, one is regarded simply as a continuance or modification of the

other as to precedent rights, and does not repeal existing obligations.

Steamship Co. *vs.* Joliffe, 2 Wall., 450.

And this would be the case under section 61 of the Mississippi constitution of 1890 (see Code of 1892, bottom page 53), which requires that when an amendment to a statute or section of a statute is made, the entire statute or section, with the proposed amendment, shall be copied or re-enacted, thus guarding against secret or vicious legislation. That requirement is followed in this case, and the substitute is in the nature of an amendment. Some privilege taxes are added and some changed, but there is no change as to railroads. At any rate, under the principle above quoted, and especially under section 100 of said constitution of 1890, the repealing clause would be ineffectual, so far as any existing liability for taxes is concerned. It is as follows:

"SECTION 100. No obligation or liability of any person, association or corporation, held or owned by this State, or levee board, or any county, city or town thereof shall ever be remitted, released, or postponed, or in any way diminished by the legislature, nor shall such liability or obligation be extinguished except by payment thereof into the proper treasury; nor shall such liability or obligation be exchanged, or transferred except upon payment of its face value," etc.

See Code 1892, bottom page 58.

In this privilege-tax matter counsel on the other side seem not to agree amongst themselves. In the brief of Mr. Eaton J. Bowers, filed on April 11, 1901, in opposition to our motion to dismiss or affirm, on page 19 he states:

"It has never been seriously contended by any of the rail-

roads enjoying exemptions, that they were not subject to this license charge for the right to do business."

This is the view held by some of the authorities.

Cooley on Tax, pp. 205, 206, and authorities cited in n. 2.

But in their present brief, filed October 4, 1901, pages 52, 53, they try to repudiate this, and argue that the exemption is irrepealable because an occupation is not property, and the constitution of 1869 says the *property* of corporations, &c.

A man cannot be deprived of life, liberty, or property without due process of law, and this court expressly holds that the right to do business is property.

Wilmington *vs.* Reid, 13 Wall., 264, 268.

One thing is certain, and that is: If it is not property, then there was no exemption in the first instance, as held by the Louisiana court, *supra*, and if it is property, then the exemption was prohibited both by sections 13 and 20 of article 12 of constitution of 1869. Privilege taxes must be placed on all of a class equally.

Holberg *vs.* Macon, 55 Miss., 114, 115.

You could just as well tax one merchant and exempt another about to commence a competing business.

Now, these are the facts, and the point we wish to impress on this court is that under the Mississippi law and practice, which we presume is not at all unique in this respect, a

party is bound by the allegations in his pleadings, and also by his written agreements made and filed in the cause.

Morgan *vs.* Reading, 3 S. & M. (11th Miss.), 396, 397.
Parkhurst *vs.* McGraw, 2 Cushman (24 Miss.), 134–136.

Under this agreement both sides, the plaintiff in error by his bill and the defendant by his demurrer (the agreement being considered a part of the bill), have agreed to stand on the proposition that the charter in this case was accepted and road built on the faith of the Mississippi Mills case "as the law," and the exact point we wish to urge is that if this court, in looking into the Mississippi Mills case, shall determine either that the charter exemption in this case was unconstitutional or that it was repealable, then under either view it becomes a closed incident, so far as this court is concerned, and you can proceed no further, for then the question as to whether it had in fact been repealed becomes one of exclusive jurisdiction in the State court, and necessarily so, as its decision the one way or the other would violate no provision of the Federal Constitution.

We think the court would arrive at the same conclusion, whether the agreement had been made or not, as a party is bound to act on the faith of the decisions of the highest court of his State, whether he agrees in writing to do so or not; but the particular distinction here is that in the one case this court will dismiss, as we will try to show hereafter, and in the other it might affirm if a sufficient color of a Federal question was made to appear.

We think this case turns on a single principle, and in order to arrive at a correct solution it is necessary to thor-

oughly apprehend, distinguish, and apply the proper one of the following three rules, all of which have been authoritatively announced and settled by this court as the law of its jurisdiction:

JURISDICTION.

1st. That in a case coming here from the lower Federal courts, this court, when it once acquires jurisdiction, has power to decide all issues properly presented by the pleadings and record.

2d. That on a writ of error to the highest court of a State the jurisdiction of this court is by law limited to Federal questions, and such Federal questions only as were presented to and necessarily embraced in the decision of the State court.

3d. That on a writ of error to the highest court of a State, where its decision is based on two or more grounds, one or more of which is or are non-Federal and sufficient to dispose of the case, no jurisdiction can attach here.

The first rule is illustrated by the cases of Carroll County *vs.* Smith, 111 U. S., 556, a Mississippi case, and the cases of—

Central Land Co. *vs.* Laidley, 159 U. S., 109–112.
Avery *vs.* Popper, 179 U. S., 305, 315.

The third rule is illustrated by the cases of—

Lowry *vs.* Silver City, &c., 179 U. S., 198.
Pittsburgh *vs.* Cleveland, 178 U. S., 279, 280.
Eustis *vs.* Bolles, 150 U. S., 361, and intermediate cases.

We think this case falls within and must be decided under the second rule, which embraces two propositions:

1. That only Federal questions can be considered.

2. And only such Federal questions as were necessarily decided in the lower court.

FIRST PROPOSITION.

In the case of Avery *vs.* Popper, 179 U. S., 315, where the supreme court of Texas in construing its laws had overruled some of its former opinions, this court says:

"This was a question either of local law or of general law. If of local law, of course the decision of the supreme court of Texas is binding upon us. If of general law, as it involved no Federal element, it is equally binding in this proceeding, since only Federal rights are capable of being raised upon writs of error to State courts. Conceding that if the question had arisen on appeal from a circuit court of the United States, we might have come to a different conclusion, it by no means follows that we can do so upon a writ of error to a State court, whose opinion upon a question of general law is not reviewable here."

In another case, in concluding the opinion, the court says:

"Upon these facts we are compelled to hold that we are confined to a discussion of the only Federal question which this record presents."

Dewey *vs.* Des Moines, 173 U. S., 200, 201.

Again:

"We are confined then to the only Federal question which this record presents."

Keokuk *vs.* Hamilton, &c., 175 U. S., 635.

And—

"These are the only questions of a Federal nature which are presented by the record, and finding no error in them, the judgment of the supreme court of Nebraska is affirmed."

W. U. Tel. Co. *vs.* Call Pub. Co., 181 U. S., 92, 104.

"While in their briefs many matters are discussed with fullness and elaboration by counsel for plaintiff in error, we are of opinion that those of a Federal nature involved in this record are few in number, and practically determined by previous decisions of this court. Of course, all questions arising under the constitution and laws of Kansas are, for the purposes of this case, foreclosed by the decisions of the State courts (Turner *vs.* Wilkes County Commissioners, 173 U. S. 461; Brown *vs.* New Jersey, 175 U. S., 172, and cases cited in opinion)."

Erb *vs.* Morasch, 177 U. S., 584, 585.

SECOND PROPOSITION.

ONLY SUCH FEDERAL QUESTIONS AS WERE RAISED IN THE COURT BELOW.

This is first decided in Dewey *vs.* Des Moines, 173 U. S., 198–200.

In another case the eighth and ninth assignments of error related to Federal questions not raised in the lower court, and this court said:

"We therefore decline to review the errors alleged in the 8th and 9th assignments."

Citizens' Sav. Bk. *vs.* Owensboro, 173 U. S., 642–644.

In another case it is said:

"In Dewey *vs.* Des Moines, 173 U. S., 193, it was held that where a Federal question is raised in the State courts, the

party who resorts to this court cannot raise another Federal question, not connected with it, which was not raised in the court below."

Keokuk *vs.* Hamilton, &c., 175 U. S., 633.

Again:

"But we are not at liberty to consider other constitutional questions, which might have been involved if they had been properly set up and claimed. The observations of this court in Dewey *vs.* Des Moines, 173 U. S., 193, are conclusive against our consideration of this question."

Bolnn *vs.* Nebraska, 176 U. S., 83, 92.

Where a Federal question is raised in the State court, the party who brings the case here cannot raise another Federal question which was not raised below.

Chapin *vs.* Fye, 179 U. S., 127.

THE POINT IN THIS CASE.

Upon the facts, then, keeping these rules in mind, the pivotal point in this case is, did the repeal of the exemption impair the obligation of the charter contract, and this reduces the case to the ultimate, whether the exemption was repealable, for if it was, then this court can go no farther, since the further question as to whether it was repealed becomes one of local law in which the decision of the State court is controlling and binding on this court.

It has been universally held that where the controversy is the construction of a State statute or local law and its decision the one way or the other would violate no provision of the Federal Constitution, then, on a writ of error to the

State court, its decision and construction is conclusive on this court.

Simon *vs.* Craft, 182 U. S., 437.
Lombard *vs.* West Chicago, &c., 181 U. S., 42–45.
St. Paul, &c., *vs.* St. Paul, 181 U. S., concluding paragraph on page 151.
Hale *vs.* Lewis, 181 U. S., 480.
Y. & M. V. R. R. Co. *vs.* Adams, 181 U. S., 583.
W. W. Cargill Co. *vs.* Minnesota, 180 U. S., 466, 467.
Abraham *vs.* Casey, 179 U. S., 218.
Avery *vs.* Popper, 179 U. S., 315.
Mason *vs.* Missouri, 179 U. S., 334.
Chesapeake, &c., *vs.* Kentucky, 179 U. S., 394.

Citing—

The Mississippi case of L., N. O. & T. R'y Co. *vs.* Miss., 133 U. S., 591.
B'd of Liquidation *vs.* Louisiana, 179 U. S., 636.
Clarke *vs.* Clarke, 178 U. S., 192.
N. Y. Life Ins. Co. *vs.* Cravens, 178 U. S., 395.
Banholzer *vs.* N. Y. Life Ins. Co., 178 U. S., 405–408.
Erb *vs.* Morasch, 177 U. S., 584, 585.
Adirondack, &c., *vs.* New York State, 176 U. S., 346.
I. C. R. R. Co. *vs.* Chicago, &c., 176 U. S., 659.
Hartford Ins. Co. *vs.* Chicago, &c., 175 U. S., 100, 108.
Brown *vs.* New Jersey, 175 U. S., 174.
McCain *vs.* Des Moines, 174 U. S., 176, 177.
Missouri *vs.* McCann, 174 U. S., 586.
Covington *vs.* Kentucky, 173 U. S., 237, 238.
Oakes *vs.* Mase, 165 U. S., 364.

22 Wall., 215, 216; 164 U. S., 112; 14 How., 76–79; 163 U. S., 207; 159 U. S., 533, 534; 158 U. S., 435, 436; 157 U. S., 331, 332; 154 U. S., 426; 139 U. S., 467.

Adams *vs.* Nashville, 95 U. S., 19–21.

Mississippi Case of Lewis *vs.* Monson, 151 U. S., 549.

In the important case of Fallbrook Irrigation District *vs.* Bradley, 164 U. S., 112, which came up from a circuit court of the United States, was argued in January and not decided till November, 1896, and in which, among other eminent counsel, such great lawyers as ex-President Benjamin Harrison and Messrs. Wm. D. Guthrie, Clarence A. Seward, Joseph H. Choate, and John F. Dillon were engaged and filed elaborate briefs, this court says, on page 154:

"This court fully appreciates the importance of the question, and its decision has been reached after due reflection upon the subject, and after a careful examination of the authorities bearing upon it."

And after such careful consideration this court says:

"Coming before the court in this way, we are not confined in our review of the decision of the lower court within the same limits that we would be if the case were here on error from the judgment of a State court."

And yet, notwithstanding it came up from a lower Federal court, this court announces the rule of its jurisdiction thus:

"If the act of the State legislature as construed by its highest court conflicts with the Federal Constitution, or with any valid act of Congress, it is the duty of the circuit court and of this court to so decide, and to thus enforce the pro-

visions of the Federal Constitution" (*ib.*, pp. 154, 155, citing many authorities).

And then says the court on page 155:

"If the act violate any provision, expressed or properly implied, of the Federal Constitution, it is the duty of this court to so declare it; but if it do not, there is no justification for the Federal courts to run counter to the decisions of the highest State court upon questions involving the construction of State statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law."

See also Central Land Co. *vs.* Laidley, 159 U. S., 109–112.

No. 107, Balt., &c., *vs.* Mayor, &c., 179 U. S., 681.

This court says:

"Whether or not an act, prescribing such particular mode, has been repealed by a general revenue act not in terms repealing it, is a matter peculiarly within the province of the highest courts of the State to decide—and when such courts have decided the question, their decision is controlling."

Bailey *vs.* Maguire, 22 Wall., 215, 216.

In another case this court says:

"The supreme court of Tennessee held in the case before us, that the statute repeals and overrides the ordinance of exemption, and brings the bonds within the scope of general taxation. This is a decision by a State tribunal, upon the construction of its own statutes which we are bound to respect."

Adams *vs.* Nashville, 95 U. S., 19, 21.

The above case of Bailey *vs.* Maguire is referred to with approval on the rehearing in the late case of

Y. & M. V. R. R. Co. *vs.* Adams, 181 U. S., 583.

Now, if the plaintiff in error had stood on its original amended bill this court might hold that it presented color for a Federal question, and in that view it would affirm the judgment, for in order to decide that the exemption was repealable it would be necessary to take jurisdiction. Such a decision would be jurisdiction; but when the plaintiff in error makes an agreement that the Mississippi Mills case *is to be the law* of this case, then the claim that the exemption is irrepealable would be modified to that extent, and it would present a different question. In the one case this court would have to assume jurisdiction to decide that the plaintiff in error was bound by the decision in the Mississippi Mills case entering into and forming a part of its charter, and in the other case the plaintiff in error agrees to that, and thus saves this court the necessity of making a decision or of assuming jurisdiction. We will endeavor to illustrate the two views:

We say "*might*" because in this particular case we do not concede that this court should take jurisdiction under either view, for another principle comes in along here. It is this:

"The facts alleged must show the nature of the suit, and it must plainly appear that it arises under the Constitution or laws of the United States; that is, there must be a real and substantial dispute as to the effect or construction of the Constitution, or some law of the United States, upon the determination of which the recovery depends (Shreveport *vs.* Cole, 129 U. S., 36; New Orleans *vs.* Benjamin, 153 U. S., 411).

"Taking the law of Iowa to be as decided in the case mentioned, (that is by the supreme court of Iowa), it appears that the validity of the city government has been sustained by the State court, and in that event there is not the shadow of a Federal question in this suit, for if the city government

be valid, the regularity and validity of the proposed assessment must necessarily follow, and there cannot be even a pretence that the collection of the assessment would be without due process of law.

"The allegation that the suit arises under the Constitution of the United States is so palpably unfounded that it constitutes not even a color for the jurisdiction of the circuit court."

McCain *vs.* Des Moines, 174 U. S., 181.

So here, taking the law of Mississippi to be as decided in Mississippi Mills *vs.* Cook, it appears that the repealability of the exemption had been definitely fixed by the State court before the charter was granted, and if the repealability of the exemption be fixed or established the validity of the repeal would necessarily follow, and there would be "*not a shadow of a Federal question in this suit.*"

That there must be a real and substantial controversy to constitute color, see also—

Illinois Central R. R. Co. *vs.* Chicago, 176 U. S., 656, 657.

W. U. Tel. Co. *vs.* Ann Arbor, 178 U. S., 243, 244.

"The claim must be real and substantial. A mere claim in words is not enough."

Lampasas *vs.* Bell, 180 U. S., 282, 283.

Citing W. U. Tel. Co. *vs.* Ann Arbor, *supra*, and Gold Washing & Water Co. *vs.* Keyes, 96 U. S., 199, and Blackburn *vs.* Portland Gold Mining Co., 175 U. S., 571.

See also 169 U. S., 595; 167 U. S., 662; 165 U. S., 172; 147 U. S., 532; 142 U. S., 87, 88.

The laws of the State as ascertained and fixed by the decisions of the court of last resort enter into and form a part of the contract.

Los Angeles *vs.* Los Angeles, &c., 177 U. S., 575.
Douglass *vs.* Pike County, 101 U. S., 677.

"In this forum, the local law of Connecticut as to real estate is the law of that State as announced by the court of last resort of that State."

Clarke *vs.* Clarke, 178 U. S., 192.

"The elementary rule is that this court accepts the interpretation of the statute of a State affixed to it by the court of last resort thereof."

M., K. & T. R'y Co. *vs.* McCann, 174 U. S., 586.
W. W. Cargill Co. *vs.* Minnesota, 180 U. S., 466, 467.

In the view we have just argued this court might have to assume jurisdiction to decide that the plaintiff in error was bound by the construction placed upon statutory exemptions from taxation, under the Mississippi constitution of 1869, by the supreme court of Mississippi, in the case of Mississippi Mills *vs.* Cook, 56 Miss., p. 40. This principle is so well settled, however, that we have endeavored to show that it does not present "*a real and substantial dispute*," but in the case at bar there is nothing for the court to decide. The plaintiff in error voluntarily comes in and agrees to be bound by the Mississippi Mills case, decided before its charter was granted, and if this court is bound by the construction placed on the constitution of 1869 by the supreme court of Mississippi in the Mississippi Mills case, then there is nothing for it to decide. Jurisdiction implies the power to decide, and *the power to decide* necessarily im-

plies the power to exercise discretion, to act freely, *to differ with the supreme court of Mississippi.* If this court is bound by the decision in the Mississippi Mills case, and the plaintiff has agreed that it shall be, then there is nothing to decide, and no occasion to exercise jurisdiction. The only thing this court can do is to announce what the supreme court of Mississippi has decided in the Mississippi Mills case, and it is no part of the jurisdiction proper of one court to act as herald for another, to announce what some other court has decided; and if this court, on looking into the Mississippi Mills case finds that it is there decided that exemptions from taxation are repealable, there is no course left but to dismiss the writ of error, as presenting no Federal question under the agreement. The effect of the agreement is to admit that a law repealing the exemption would be valid, and to rest on the first proposition in the amendment to the bill, that the claim that it had been repealed in fact "is utterly untrue"—to admit the law, but deny the fact.

In such cases this court holds that where there is no dispute as to the validity of the law, but a contest as to its proper construction, there is no Federal question.

Y. & M. V. R. R. Co. *vs.* Adams, 180 U. S., 46.

Citing—

Central Land Co. *vs.* Laidly, 159 U. S., 103.

St. Joseph *vs.* Steele, 167 U. S., 661, 662.

INTERPRETATION OF NEW YORK STATUTES BY SUPREME COURT OF MINNESOTA.

This court says:

"That question, therefore, is made the ground of our jurisdiction. The defendant in error challenges its sufficiency, and moves to dismiss because the supreme court of Minnesota did not deny the validity of the New York statute, but only construed it, and, even granting the construction was erroneous, faith and credit was not denied to the statute. Glenn *vs.* Garth, 147 U. S., 360, and Lloyd *vs.* Mathews, 155 U. S., 22, are cited. Those cases sustain the distinction which the defendant in error makes, &c. * * *

"The plaintiff in error assails the conclusions of the court. It asserts the court erred in its construction of the *Conway* case, and erred in its independent construction of the New York statute.

"Granting, *arguendo*, the correctness of both assertions, the validity of the statute was not denied," &c.

"Dismissed for want of jurisdiction."

Banholzer *vs.* N. Y. Life Ins. Co., 178 U. S., 405, 406, and 408.

"The writ will lie, if the validity or construction of the judgment of the Federal court, or the regularity of the proceedings under the execution, are assailed; but if it be admitted that the judgment was valid, and the proceedings regular * * * no Federal question is presented."

Avery *vs.* Popper, 179 U. S., 314.

"The parties stipulated and agreed that the plaintiff would make no claim of right to maintain the action except under and by virtue of the law in question. * * *

"The questions just stated are questions of local law, and in determining whether the statute violates any Federal right

secured by the Federal Constitution, we must in the particulars named, accept the interpretation put upon it by the State court."

W. W. Cargill Co. *vs.* Minnesota, 180 U. S., 463, 466.

"As it is apparent from the foregoing considerations that, even conceding the contract to be as contended, no legislative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract—within the purview of the Constitution—did or could result, it follows that the record involves solely an interpretation of the contract, and, therefore, presents no controversy within the jurisdiction of this court."

See concluding paragraph of opinion in—

St. Paul Gas Light Co. *vs.* St. Paul, 181 U. S., 151.

And so in this case. The parties have agreed to rest on the Mississippi Mills case. That amounts to an estoppel, as we have above pointed out in Parkhurst *vs.* McGraw, 24 Miss., 134–136, and they are bound by what the Mississippi Mills case decides as much as if it was a judgment and *res adjudicata*, and this court has decided that a former judgment binds and concludes as well as to Federal questions as to others. This court holds:

"Whatever may be the nature of a question presented for judicial determination—whether depending on Federal, general or local law—if it be embraced by the issues made, its determination by a court having jurisdiction of the subject-matter and the parties, binds the parties and their privies so long as the judgment remains unmodified or unreversed."

Mitchell *vs.* First Nat. B'k, 180 U. S., 480, 481.

The question of the impairment of the obligation of the contract under section 10 of article I of the Constitution of the United States was expressly put in issue, "embraced by the issues made," in the Mississippi Mills case, and was necessarily decided, and hence the decision is as binding on that issue as on any other. That it was expressly put in issue see—

Mississippi Mills *vs.* Cook, 56 Miss., 45.

See "Appendix B" to this brief.

Hence the Mississippi Mills case not only decided that the exemption was repealable, but it also decided the identical question attempted to be raised here, and that the repeal did not violate the Federal Constitution. It was embraced in the issue, and necessarily decided, and a writ of error could have been allowed from this court.

It was distinctly and expressly put in issue and conclusively established the double proposition that exemptions were repealable, and that a repeal was not repugnant to the Federal Constitution.

THE MISSISSIPPI MILLS CASE.

This brings us to a consideration of the celebrated Mississippi Mills case and what was therein decided. As it is the basis on which this case must rest, not only under well-recognized principles of law, but also by the agreement, it is important and material that this court should have a clear conception of that case, and for the convenience of the court we have had the case printed in full and inserted as "Appendix B" to this brief, page for

page, just it occurs in the 56th Mississippi Report, on pages 40 to 72. The marginal pages are the same as those in the report. In fact, as that case was by the agreement made a part of the amended bill, it should in reality have been copied in full as a part of the record in this case. The italics on pages 53, 62, and 65 are ours. What did the Mississippi Mills case decide? The supreme court of Mississippi decided that the Mississippi Mills case decided that exemptions were repealable.

Attala County *vs.* Kelley, 68 Miss., 44.

Whatever it decided, it is certain that the Mississippi constitution of 1869 was adopted on December 1, 1869, and that case was decided at the April term, 1878, and the charter in this case was granted in 1882, and there was no other decision construing, or even referring to, the constitution with reference to exemptions till the case of McCulloch *vs.* Stone, 64 Miss., 378, in 1886.

The rule as settled by this court is stated thus:

"Where subsequent State legislation is asserted to be repugnant to the Constitution of the United States because such legislation impairs the obligations of a contract, the power to determine whether there be such impairment imposes also on this court the duty, when necessary, to ascertain whether there was a contract and its import."

St. Paul Gas Light Co. *vs.* St. Paul, 181 U. S., 147.

And this investigation and construction this court must make independently for itself. Many of the principal cases on this subject are collected and cited in—

Stearns *vs.* Minnesota, 179 U. S., 233.

See also Y. & M. V. R. R. Co. *vs.* Adams, 180 U. S., 15.

As this court has decided, as shown *supra*, that the constitution and laws in force at the time, as expounded by the court of last resort, enter into and form a part of the contract, the constitution of 1869 and this case of Mississippi Mills, so far as applicable, enter into and form a part of the alleged contract of exemption in this case. If reading them into it makes it repealable, then its repeal could not impair its obligation. This court says:

"The elementary rule is that if at the time a corporation is chartered and given either a commutation or exemption from taxation, there exists a general statute reserving the legislative power to repeal, alter or amend, the exemption or commutation from taxation may be revoked without impairing the obligations of the contract, because the reserved power deprives the contract of its irrevocable character and submits it to legislative control. The foundation of this rule is that a general statute reserving the power to repeal, alter or amend is by implication read into a subsequent charter and prevents it becoming irrevocable."

Citizens' Sav. B'k *vs.* Owensboro, 173 U. S., 644.
Also N. Y. & N. E. R. R. Co. *vs.* Bristol, 151 U. S., 567.

And the same rule applies when it is made repealable by a constitution.

Hamilton, &c., *vs.* Hamilton, 146 U. S., 267–271.

Now, what does the Mississippi Mills case decide? It certainly decides, whether the exemption is void or not, that it is repealable; and, this being the case, this court might rest there, and is under no real necessity to decide whether it is void or valid but repealable,

because in neither event would a repeal impair its obligation; but if this court thinks proper to give a definite construction, we think it is not inconsistent with the Mississippi Mills case to say the alleged exemption was unconstitutional and void. Let us look at the circumstances under which that case was decided. A short time before that this court had decided that "general encouragements held out to all persons indiscriminately to engage in a particular trade or manufacture, whether in the shape of bounties or drawbacks or any other advantage, are always under the legislative control." See concluding part of opinion in—

Salt Co. *vs.* East Saginaw, 13 Wall., 379.

That was an exemption to manufactories of salt. In a later case it was manufactories generally with the same ruling.

Welch *vs.* Cook, 97 U. S., 541, 542.

In the Mississippi Mills case it was factories of a certain class, and the act was known as the "factory act."

In the Salt Company case, 13 Wall., pages 376, 377, this court says:

"Had the plaintiff in error been incorporated by a special charter, and had that charter contained the provision, that all its lands and property used in the manufacture of salt should forever, or during the continuance of its charter, be exempt from taxation, and had that charter been accepted and acted on, it would have constituted a contract."

And on page 378 it says:

"Charters granted to private corporations are held to be contracts."

In the Mississippi Mills case this case of Salt Co. *vs.* E. Saginaw was cited in the brief of the Attorney General, on page 49.

So in the consideration of that case the court had the Salt Company case before it, and evidently followed it, holding, as this court had done, that these exemptions to factories were repealable at the will of the legislature. But, having in mind the ruling of this court *supra*, that "charters granted to private corporations are held to be contracts," the court in the Mississippi Mills case was careful to say, on page 53:

"And the legislative act, whether it be a charter or other form of law, which says it shall be exempt, and not subject to taxation, is in conflict with the constitution."

And, on page 62:

"If the exemption is granted in the form of a contract in the charter, that is prohibited."

And again, on page 65:

"There is no limitation on the power of the legislature to incorporate railroad, manufacturing or other like corporations, and the grant of all the franchises usual and necessary to the complete and orderly performance and conduct of the several businesses and enterprises, except that the legislature cannot grant them an immunity from taxation. The legislature is prohibited by the constitution from making that contract with the corporations."

In the case of Y. & M. V. R. R. Co. *vs.* Adams, 77 Miss., pp. 278–287, No. 35, October term, 1900, here, the supreme court of Mississippi make a clear distinction between a grant

of exemption to all factories alike and the grant of an exemption to a particular corporation, holding the latter to be unconstitutional and void, and making the same distinction in the later case of Adams *vs.* The Tombigbee Mills, in which they held the exemption to be valid, but repealable on the authority of the Mississippi Mills case. This last case will be in the 78th Mississippi Report, which has not yet been published; but if this court wishes to examine it, certified copies of the opinion were printed and are on file in said case, No. 35, October term, 1900, here. It is also in 29 So. R., 470.

This court holds that the State court is justified in making such distinctions, and that they involve the construction of a statute, but no Federal question.

Wood *vs.* Brady, 150 U. S., 20–23.

In fact, in an ornate but powerful opinion delivered by Mr. Justice Brewer in a case where the State court had rendered conflicting decisions, and this court for that reason had to exercise its own independent judgment, this court held that a party had no strict legal right to rely on a decision unless he occupied the identical position and the statute construed was the identical statute, and in this case it is not the identical statute, and the plaintiff in error is not a factory. The court said:

"While in the matter of structure there is between the act of 1869 and that of 1880 a striking resemblance, there are also marked differences. Even if in form they are absolutely alike, yet, as they are acts respecting different classes of corporations, the validity of one would not necessarily determine the validity of the other."

And unanswerable reasons are given, and the court held the act unconstitutional, although the supreme court of Ohio had held a similar one valid, *before the one in controversy was granted.* It is very much like the principles involved here. We ask the court to re-read it.

Pleasant, &c., *vs.* Ætna Life Ins. Co., 138 U. S., 67.

Opposite counsel append a list of charter exemptions, and try to convince the court that the grant of these exemptions was so universal that, taken in the aggregate, the charters may be said to amount to a general law exempting all railroads from taxation, and to be in effect the same as the factory law exempting manufacturing enterprises by a general law. But we also append hereto a list as "*Appendix A*," to show that, as a matter of fact, in many cases no exemptions were granted, and that there was no uniformity or equality in those that were granted; so that the question here falls neither within the letter nor spirit of the Mississippi Mills case.

See also Adams *vs.* Y. & M. V. R. R. Co., 77 Miss., 282, 283.

But even if that contention were true, it would avail the plaintiff in error nothing, for this court, in the above-recited cases of Salt Co. *vs.* E. Saginaw, 13 Wall., and Welch *vs.* Cook, 97 U. S., and the Mississippi court in said Mississippi Mills case decided that all such general exemptions were repealable at the will of the legislature; and, if so, a repeal could not impair the obligation of the contract. It is immaterial to us which view this court takes. We are here simply trying to assist the court in arriving at the correct view.

The supreme court of Mississippi makes a distinction and

holds that the grant of an exemption to a single railroad corporation by name, when the exemption does not extend to all railroads in the State in the same class and condition, is repugnant to the constitution of 1869 and void.

Adams *vs.* Y. & M. V. R. R. Co., 77 Miss., 272–275.

And this court has unhesitatingly and uniformly held that provisions like those in the said Mississippi constitution rendered it impossible for the legislature thereafter to grant exemptions.

L. & N. R. R. Co. *vs.* Palmes, 109 U. S., 253–255.
St. Louis, &c., *vs.* Berry, 113 U. S., 475.
Trask *vs.* McGuire, 18 Wall., 391.
Y. & M. V. R. R. Co. *vs.* Adams, 77 Miss., 274, 275, 288.

And this principle was approved in—

Keokuk, &c., *vs.* Missouri, 152 U. S., 303, 304, 310, 311.

In the case of Trask *vs.* McGuire, *supra*, a different word is used. In the constitution in that case, the word "*exempt*" is used instead of "subject." No railroad shall be exempt from taxation; all railroads shall be subject to taxation. In the Mississippi Mills case the court made a point that the constitution did not say shall be subjected to taxation, and in the Trask case they would have made the same point, that it did not say shall not be exempted from taxation. In the other cases the word "*subject*" is used. So that on an independent construction, as in the above case of Pleasant, &c., *vs.* Ætna Life Ins. Co., this court would undoubtedly

hold the pretended exemption to be unconstitutional, as the supreme court of Mississippi did.

But whether it was void or only voidable at the will of the legislature, there is and can be no doubt that under the Mississippi Mills case all exemptions to corporations for pecuniary profits were repealable, and that is all that it is really necessary for this court to decide. In order to be accurate and definite, it can decide that the alleged exemption was unconstitutional, and therefore repealable, or that it was valid *pro tempore*, but repealable.

In either view we will now again press the point and endeavor to show that the further question, whether it was in fact repealed, was a question of local law and statute, in which this court is bound by the decision of the State court, and hence one over which on a writ of error to a State court you have no jurisdiction, as in that class of cases you have jurisdiction over only Federal questions.

LOCAL LAW—JURISDICTION ON WRIT OF ERROR TO STATE COURTS.

On a question of the impairment of a contract, this court necessarily has the right, jurisdiction, and duty to exercise an independent judgment and construction over all those acts, constitutions, and statutes which enter into and form the contract and limit its import. It takes them all to make the contract. They are of its essence and must be considered. This court rightly says in St. Paul Gas Light Co. *vs.* St. Paul, 181 U. S., 147, *supra*, that "the power to determine whether there be such impairment imposes also on

this court the duty, when necessary, to ascertain whether there was a contract and its import."

Also Y. & M. V. R. R. Co. *vs.* Adams, 180 U. S., 15.

But the exact and particular point we wish to press here is that if this court, on an examination of the contract and its import, shall find that some subsequent act, unconnected with the original formation or existence of the contract or its obligation, would not impair such formation, existence, or obligation, then the subsequent act becomes one of purely local law or concern, over which this court has no jurisdiction on a writ of error to a State court.

In the case above cited this court says:

"Abstractly speaking, the duty would be first in order to determine whether the contract existed and its true meaning, before ascertaining whether any obligations of the contract had been impaired by subsequent legislation."

St. Paul Gas Light Co. *vs.* St. Paul, 181 U. S., 147.

As was done in that case, however, the court often, for convenience, reverses the proper order of argument and determines first whether the subsequent act complained of in fact had any existence. This is all very well when this court *agrees* with the State court as to its construction of the subsequent act; but if this court should not so agree, then it becomes all wrong, for under the rule repeatedly laid down by this court it would be bound by the construction of the State court and could not reverse, and the only effect of expressing an opinion would be to create dissatisfaction among the litigants and attorneys on both sides. In that very case this court concludes its opinion, on page 151, in these words:

"As it is apparent from the foregoing considerations that, even conceding the contract to be as contended for, no legis-

lative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract,—within the purview of the Constitution,—did or could result, it follows that the record involves solely an interpretation of the contract, and, therefore, presents no controversy within the jurisdiction of this court."

Again:

"In either contingency, therefore, there was no cause of complaint so far as Federal rights were concerned. The contention advanced, therefore, amounts to this, that a violation of the Constitution of the United States has been produced by the exercise of a power which, whatever view may be taken, could be brought into play without giving rise to a conflict with such Constitution. * * * In thus stating the ultimate deduction to which the proposition necessarily leads, we do not wish to be understood as implying that we think the reasoning upon which the supreme court of the State of Illinois placed its decision in this case is amenable to the inconsistency which it is insisted it embodies. As that consideration is wholly beyond the pale of our jurisdiction, we have not even approached its consideration."

Lombard *vs.* West Chicago, &c., 181 U. S., 42, 43, 45.

As "no legislative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract,—within the purview of the Constitution,—did or could result, it follows that the record involves solely an interpretation of the contract, and therefore presents no controversy within the jurisdiction of this court."

St. Paul, &c., *vs.* St. Paul, 181 U. S. (conclusion), 151.

"That question involved the construction of the Wisconsin statute, but no Federal right. Dismissed."

Hale *vs.* Lewis, 181 U. S., 480.

"In arriving at these conclusions the court of appeals was construing and applying the laws of the State of New York, and we perceive no adequate ground for declining to accept its views in accordance with the general rule on that subject. In any view, we think that the proceedings on the part of the State impaired the obligation of no contract between it and the railroad company."

Adirondack, &c., *vs.* New York State, 176 U. S., 346.

The same view is expressed in the dissenting opinion of Messrs. Justices Harlan and McKenna in the case of American Express Co. *vs.* Michigan, 177 U. S., 419, in which they disagreed with the court as to whose duty it was to affix the revenue stamp. They thought it was the duty of the express company to affix and cancel the stamp, and then conclude:

"Whether the company, having issued a receipt duly stamped and canceled, could increase its charges against the shipper for the purpose, whether avowed or not, of meeting this additional expense, is not, in our opinion, a Federal question, and upon that point this court need not express an opinion."

And—

"Without implying that the reasoning by which this conclusion was deduced would command our approval were we considering the matter as one of original impression, and without pausing to note the ulterior consequences which may possibly arise from the ruling of the court below on the subject, we adopt and follow it, as the construction put by the supreme court of the State of Louisiana on the statutes of that State in a matter of local and non-Federal concern."

Board, &c., *vs.* Louisiana, 179 U. S., 636.

"However much we may doubt the soundness of any interpretation of the State constitution, * * * we must assume, in conformity with the judgment of the highest court of Kentucky, that section 170 of the constitution of the Commonwealth cannot be construed as exempting the lands in question from taxation."

Covington *vs.* Kentucky, 173 U. S., 237.

"With this part of the opinion, however, we have no concern. * * * If we are bound by the interpretation of the statute we need not review the reasoning by which that interpretation was reached, and we think we are bound by it."

N. Y. L. Ins. Co. *vs.* Cravens, 178 U. S., 395.

"Pursuant to this rule, and without expressing any opinion on the question, we assume," &c.

W. W. Cargill Co. *vs.* Minnesota, 180 U. S., 467.

We will illustrate the point by a case or two from Mississippi.

In the case of Y. & M. V. R. R. Co. *vs.* Thomas, 132 U. S., 174, the charter granted an exemption for twenty years from the completion of the railroad to the Mississippi river, and this court, giving its own independent construction to the contract, decided that the exemption did not commence till the railroad was completed to the river. This was making a construction of the contract itself, which would have included any laws or statutes entering into and forming part thereof, but not some subsequent act or law unconnected with its original obligation.

And so in the late case of Y. & M. V. R. R. Co. *vs.* Wirt Adams, 180 U. S., 1, the court, in its necessary duty of "as-

certaining whether there was a contract and its import," decided that a new company was formed by the consolidation, and that the exemption, for reasons stated, did not enter into it. There the court, in ascertaining whether there was a contract, decided, as the effect of the consolidation, that there was no contract to impair, and hence it was unnecessary to decide anything else. In the Thomas case the *import* of the contract was decided, and, in the last case, the non-existence of the contract. On the rehearing the court had to construe certain laws to ascertain whether the contract was existent or non-existent in 1892.

And so in Louisville Water Co. *vs.* Kentucky, 170 U. S., 127. In that case there was a general law of February 14, 1856, which provided that "all charters, &c., shall be subject to amendment or repeal at the will of the legislature," &c. (page 128). By the act of April 22, 1882, the plaintiff in error was granted an exemption from taxation, but was to furnish water to the city of Louisville free of charge. On May 17, 1886, the Hewitt statute was passed, subjecting all property to taxation "not herein expressly exempt by law." This act took effect on September 14, 1886. The State of Kentucky attempted to collect the taxes for 1886, but this court held—

"That such exemption being a vested right under the act of 1882, to be withdrawn only by statute having a prospective operation, could not be withdrawn except as to taxes accruing after the statute took effect. * * * It results that the company cannot be held for taxes which were assessed and became due prior to September 14, 1886, when the Hewitt act took effect."

Ib., pp. 132, 133.

An executed contract can no more be impaired by subsequent legislation than an executory contract, and in that case this court held that the repealing statute could not have the effect given it by the State court because that would impair the obligation of the contract. There the impairment would be by the *statute as construed* and not by the decision.

But in the prior case of Louisville Water Co. *vs.* Clark, 143 U. S., 1, we respectfully submit that this court went farther than was necessary under its later rulings above quoted. That was a suit for the taxes of 1887 under this same Hewitt act.

There the court held that under the general statute of February 14, 1856, reserving the power to amend or repeal charters, the exemption granted in the act of 1882 was repealable, and then proceeds to review the statutes to show that the supreme court of Kentucky was right in holding that it had been repealed. What we contend is, that if it was repealable, then the decision of the supreme court of Kentucky that it had been repealed was conclusive on this court, as it would not involve the impairment of a contract. As was said by this court in the conclusion of its opinion:

"We therefore hold that it was competent for the legislature to withdraw the exemption from taxation granted by the act of 1882. The authority reserved in the act of 1856 to amend or repeal constituted a part of whatever contract was made by the act of 1882, and its exercise in the present instance cannot be said to have impaired the obligation of such contract, or in any just sense to have impaired rights previously vested."

Louisville Water Co. *vs.* Clark, 143 U. S., 17.

And so here, under the agreement, the constitution of 1869 and the Mississippi Mills case in 1878 "constituted a part of whatever contract was made by the act of 1882," and it being repealable, the question whether it was in fact repealed was one of local law, and this court is bound by the decision of the State court that it was repealed and need not express any opinion on that point.

We believe it was Benjamin Franklin who said that it was an unfair method of argument to proceed by asking questions; but we think a question is justifiable in this connection, and will bring to the front with clear effect the point we have just been pressing. It is this: That this court decided in the Clark case, *supra*, that the exemption was repealable, *and also that it had been repealed*, and thus agreed with the supreme court of Kentucky. But suppose this court had decided that it was repealable, and had then disagreed with the supreme court of Kentucky, and held that it had not been repealed, what kind of a decision would this have been on a writ of error to a State court—a decision that a repealable exemption had not been repealed?

As well said by this court:

"To grant the relief demanded would quite effectually overrule the decision of the State court upon a question relating purely to the local law of the State."

McCain *vs.* Des Moines, 174 U. S., 176.

"The court of appeals has found such to be the intention of the General Assembly in this case, * * *. In thus holding the act to be severable, it is laying down a principle of construction from which there is no appeal."

Chesapeake, &c., *vs.* Kentucky, 179 U. S., 394.

And it quotes to the same effect the Mississippi case of—

L., N. O. & T. R'y Co. *vs.* Miss., 133 U. S., 587.

Ib., pp. 393, 394.

The rule is:

"Questions of public policy, * * * or upon contracts made and to be performed, *within one of the States of the Union*,—when not controlled by the Constitution, laws or treaties of the United States, or by the general principles of the commercial or mercantile law, or of general jurisprudence, of national or universal application—are governed by the law of the State, as expressed in its own constitution and statutes, or declared by its highest court."

See, citing many authorities—

Hartford Ins. Co. *vs.* Chicago, &c., 175 U. S., 100.

As held by the court in St. Paul, &c., *vs.* St. Paul, 181 U. S., 147, *supra*, the correct and logical way is "first to determine whether the contract existed, and its true meaning."

See also—

N. O. *vs.* N. O. Water Works Co., 142 U. S., 88.

Y. & M. V. R. R. Co. *vs.* Adams, 180 U. S., 15.

If it is an irrepealable contract, then the court, having determined that, can proceed to investigate and pass judgment upon the acts or things which are alleged to impair it; but if the court finds that it is repealable, and that in no view of it could the act or thing complained of impair it, then it is clear that such act or thing is divested of every vestige of a Federal nature. In the other cases this court can reverse or use what order of argument it pleases to suit its own convenience, but if the act complained of would in

no event impair the obligation of the contract, then it seems to us that an inverse and illogical order of argument, by which this court would be enabled to avoid passing on the only Federal question before it, would be an evasion of its duty, and we do not think that a court with the great learning, ability, and dignity of this court would permit any line of reasoning or argument to have weight with it that would sacrifice the substance to the shadow. Put it in what light you please, turn and twist it as you may, if you consider that the exemption in this case is either void or repealable, and you get around deciding that fact by inverting the order of correct reasoning, and hold that it has not in fact been repealed, the substantive and real thing that you have done is to reverse the supreme court of Mississippi on a matter within its exclusive jurisdiction, and that did not and could not in the nature of things impair the contract, and that did not in truth or in fact violate a single provision of the Constitution or any law or treaty of the United States.

THE REPEAL.

If, however, this court concludes to go into the question of whether there was or was not a repeal, we call attention to the similarity between the code of 1892 and these laws passed on in the Welch and Louisville Water Co. cases.

Section 3744 of the Code of 1892 provides that "the following property, *and no other*, shall be exempt from taxation, to wit," and then proceeds to enumerate, and railroads are not mentioned.

This was amended by the act of February 7, 1894, and by

the act of March 23, 1896, by adding to the list, but railroads are nowhere mentioned. In each case they commence by saying, "the following property *and no other* shall be exempt from taxation." The italics are ours.

Laws 1894, pp. 25, 26.

Laws 1896, pp. 65–68.

In the Water Company case the statute declares that—

"All property, real and personal, within this State, not herein expressly exempt by law, shall be assessed," &c.

And this was held to repeal all exemptions not excepted.

143 U. S., 6, 11.

In the Welch case the statute provided that—

"There shall be levied on all real estate in said district, except that belonging to the United States, and the District of Columbia, and that used for educational and charitable purposes the following taxes," &c.

And the enumeration of the property to be excepted was held to exclude all that was not thus excepted.

Welch *vs.* Cook, 97 U. S., 541, 542.

Adams *vs.* Y. & M. V. R. R. Co., 77 Miss., 289-293, 316–318.

If the railroad of the plaintiff in error was liable to taxation, then section 100 of the constitution of 1890, heretofore quoted, prevented the legislature from thereafter ever remitting, releasing, postponing, or in any manner diminishing the same, and absolutely prohibited its extinguishment except by payment thereof into the proper treasury.

So far as the contention by opposite counsel is concerned, on page 62 of their late brief, that the exemption was not repealed by the Code of 1892, because section 8 of that Code prevents its application to local and private laws, it may be said that on page 25 they claim that a railroad charter is such a public act that the courts take judicial notice of it. Besides, the law of 1896 as to privilege taxes, and also that of 1896 as to what shall be exempt, neither of them have any reference to this section 8 of the Code.

As the taxes here were levied after the constitution of 1890 took effect, their argument on page 54, as to the effect of section 181 thereof, has no application, and their argument that if it did not apply to railroads, there would be little for it to apply to, is a mistake, as their brief shows it was made to apply to the Tombigbee mills, and would apply to many other things where corporations were legally entitled to exemptions for the time being.

On page 64 they show plainly and state that the railroad commission, under the law, were only to assess railroads "liable to taxation" and "abstain from assessing exempt railroad property."

It then clearly devolved on the railroad commission to determine whether the property was liable to taxation, and, that being so, its decision was *judicial* and could not be attacked in this collateral manner, but only by certiorari from the circuit court, under the Code of 1892, sections 89 and 90, as settled by the State supreme court in—

Y. & M. V. R. R. Co. *vs.* Adams, 77 Miss., 764, and authorities of this and other courts cited.

And the decision that the finding of the railroad commission is *res adjudicata* presents no Federal question.

Association, &c., *vs.* Kelley, 29 Ore., 412.
Altschul *vs.* Gittings, 86 Fed. Rep., 201, 202.
R. R. Co. *vs.* Patterson, 154 U. S., 130.
Palmer *vs.* McMahon, 133 U. S., 660.
San Francisco *vs.* Itsell, 133 U. S., 65.

So far as their claim in their brief, on pages 33 and 64, that the constitutional and unconstitutional parts of a statute are severable, that is concluded by the decision of the State court (Chesapeake *vs.* Kentucky, 179 U. S., 394, *supra*), and so is the State court's construction of the word "*non-taxable*" in code of 1892, section 3875. We think the main thing referred to in that section as non-taxable, from reading the whole section, was property "*in other States.*"

LACHES, ESTOPPEL.

So far as any claim may be made that the State is estopped by the laches or failure of its officers to collect the taxes for the previous years, the plain answer is, first, that the plaintiff in error has not lost anything or changed its position by reason of that fact; second, the State cannot be estopped by the laches of its officers, and, third, estoppel is not a Federal question and cannot be raised on a writ of error to a State court.

Weyerhaueser *vs.* Minnesota, 176 U. S., 558, 559.
Hale *vs.* Lewis, 181 U. S., 480, and authorities.
Speed *vs.* McCarthy, 181 U. S., 275.

United States *vs.* Beebe, 180 U. S., 353, 354.
Y. & M. V. R. R. Co. *vs.* Thomas, 132 U. S., 185.
Vicksburg, &c., *vs.* Dennis, 116 U. S., 665.
Central Land Co. *vs.* Laidley, 159 U. S., 109–112.
2d Thompson Comm. Law Priv. Corp., § 2825.
(4th ed.) Blackwell Tax Titles, pp. 184–186.
Kansas City, &c., *vs.* Hannibal, 81 Mo., 290, 291.
Delaware, &c., *vs.* Commonwealth, 50 Pa. St., 407, 408.

Respectfuly submitted.

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APPENDIX A.

RAILROADS NOT EXEMPT, REPEAL OF EXEMPTIONS, WANT OF UNIFORMITY, &c.

Laws of 1870.

Southern Railroad Association, p. 214.
West Feliciana, p. 250.
Brownsville and Holly Springs, p. 295.
Raymond and Bolton, p. 312.
Vicksburg and Meridian, p. 308.

Laws of 1871.

Winona and Yazoo River, p. 156.
New Orleans and Northeastern, p. 160.
New Orleans, Jackson and Great Northern, p. 172.
Prentiss and Bogue Phalia, p. 253.

The following railroads were given the privileges, but not immunities of other roads:
Macon and Tombigbee River, sec. 16, p. 155.
North Mississippi, sec. 13, p. 228.
Corinth and Nashville, sec. 1, p. 262.

Laws of 1872.

Natchez and New Orleans, p. 234.
Vicksburg and Natchez, p. 256.
West Point, Starkville and Kosciusko, p. 268.

The following railroads were given ostensibly the same privileges as the Mobile and Northwestern, but required to transport fertilizers free and pay a tax of one mill per mile on passengers:
Mississippi River and Sardis, sec. 15, p. 386.
Natchez and Brookhaven, sec. 15, p. 367.
New Orleans and Northeastern, sec. 1, p. 314.
Corinth, Kossuth and Kosciusko, sec. 27, p. 346.

LAWS OF 1873.

Floryville and Bogue Phalia, p. 581.
Hillsboro Branch, p. 599.
Mississippi and New Orleans, p. 598.
Grand Gulf and Brookhaven, p. 490.

The following railroads were required te transport fertilizers free and pay one mill per mile on passengers, as *supra*:
Pascagoula and Jackson, sec. 9, pp. 496, 499.
Mobile and Little Rock, sec. 8, pp. 576, 579.

LAWS OF 1874.

No railroad charters granted.

LAWS OF 1875.

Aberdeen, Fulton and Eastport, p. 198.
No other railroad charter granted.
Privilege or commutation tax levied on all railroads, p. 66.

LAWS OF 1876.

No railroad charters granted.

LAWS OF 1877.

Yellow Creek and Tombigbee, p. 165.
No other railroad charter granted.

LAWS OF 1878.

Alabama Central, p. 448.
West Point and Tombigbee, p. 473.
Port Gibson, Utica and Crystal Springs Railroad Company was granted exemption for five years, sec. 21, p. 472.
Privilege or commutation tax laid on all railroads, p. 87.

LAWS OF 1880.

Exemption of New Orleans and Northeastern repealed, p. 248.
Yazoo, p. 215.

Holly Springs and Memphis, p. 234.
Yazoo Delta, p. 252.
Mississippi and Sunflower, p. 264.
Liberty and Mississippi River, p. 687.
Ripley railroad released from subsidy, but required to pay all other taxes, secs. 1 and 2, p. 269.
Mobile and Northwestern released from back taxes, p. 271.

LAWS OF 1882.

New Orleans, Baton Rouge, Vicksburg and Memphis, p. 920.
Memphis and New Orleans Railroad and Levee Co., sec. —, p. 883.
Richmond and Danville Extension Co., p. 1036.
Some charters exempted railroad, its stock, franchises, &c., for twenty years after completion to some point, not to extend beyond twenty-five years from date of charter, as to State taxes, and perpetually as to county and town taxes, as—
Yazoo and Mississippi Valley, sec. 8, p. 847.
Alabama and Mississippi, sec. 8, p. 870.
Others not to extend beyond twenty years from date of charter, as—
Meridian, Brookhaven and Natchez, sec. 22, p. 1064.
Canton, Aberdeen and Nashville, sec. 8, p. 1009.
Others had straight exemption for twenty years from State, county, town, and special taxes, but no exemption as to stock, as—
Helena, Sardis, Pontotoc, and Birmingham, sec. 25, p. 895.
Others exempt railroad, its stock, &c., from taxation, but do not specify county or municipal taxation, as—
Mississippi and Arkansas, sec. 13, p. 942.
Others exempt the railroad, but say nothing about either its stock or counties and towns, as—
Birmingham and Northwestern, sec. 18, p. 1049.
Another exempts from State taxes for twenty years, and counties and towns perpetually, except as to the city of Meridian, as—
Meridian, Winona and Helena, sec. 22, p. 959.
Others exempt from State taxes for twenty years after completion to some point, and from county and town taxes for twenty years absolutely, as—
Mississippi and Mexican Gulf, sec. 27, p. 974.

Others exempt the railroad, but say nothing about the company or its stock, &c., as—

Mississippi, Alabama and Georgia, sec. 26, p. 988.

Others exempt the company, its stock subscriptions, and mortgage obligations, as—

Tennessee and Mississippi Rivers, sec. 26, p. 1000.

LAWS OF 1884.

Baldwin, Marietta and Purple Shell, p. 883.

Aberdeen and Fulton, sec. 3, p. 953.

The following railroads are given the exemption specified in section 22 of the charter of the Meridian, Winona and Helena Railroad Company, *supra*, except that the exemption as to cities and towns is stricken out. It will be noted also that said railroad is to be exempt for twenty years from completion to the Mississippi river, when some of the other railroads were not intended to go to the Mississippi river:

Macon and Tuscaloosa, sec. 2, p. 916.

Memphis, Oxford and Columbus, sec. 3, p. 920.

Mississippi River and Deer Creek, sec. 3, p. 918.

Helena, Memphis and New Orleans, sec. 3, p. 938.

Terry, Brandon and Northeastern, sec. 3, p. 937.

Arkansas City, Winona and Eastern, sec. 3, p. 971.

LAWS OF 1886.

The following railroads were exempted till one year after completion:

Kansas City, Memphis and Birmingham, sec. 11, p. 199.

Memphis, Birmingham and Atlantic, sec. 7, p. 206.

Pensacola and Memphis, sec. 21, p. 221.

Vicksburg, Yazoo Delta and Northeastern exempt one year from State but perpetually from city and town taxes, sec. 8, p. 227.

LAWS OF 1888.

Brookhaven, Columbia and Mobile, sec. 3, p. 509.

Corinth, Birmingham and Bolivar, p. 472.

Mobile, Hattiesburg and Jackson, p. 481.

The following railroads were exempt for one year after completion :

Macon, Tuscaloosa and Birmingham, sec. 17, p. 499.

Helena, Tupelo and Decatur, sec. 17, p. 508, and many others not exempt, or only till one year after completion, pp. 511, 514, 526, 531, 546, 557, 559, 570, 591.

LAWS OF 1890.

Large number of railroads incorporated. None exempted longer than one year after completion, pp. 677–778.

Then comes article 7 of the constitution of November 1, 1890.

And then Code of 1892, in which sec. 3379 puts a privilege tax on railroads, and sec. 3884 provides that the tax collectors shall collect the ad valorem tax on railroads "in all respects as they collect other taxes;" and sec. 3803 provides that they shall collect other taxes in United States coin, Treasury notes, and national currency, and besides, State warrants for State taxes and county warrants for county taxes.

APPENDIX B.

Statement of the Case.

THE MISSISSIPPI MILLS
v.
W. W. COOK, *Tax Collector.*

1. Taxation—Exemption of corporations—Intendment of sect. 13, art. 12, of the State constitution.—Sect. 13, art. 12, of our State constitution declares that "the property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals." This section was not intended to confer power on the legislature to tax property of corporations of the class mentioned, for that existed without this section, as an inherent legislative power. It was not intended to require the taxation of property of corporations whose charters, previously granted, secured them from taxation, for this was beyond the power of the framers of the constitution. It was not designed to establish the rule that all corporations for pecuniary profits must always be taxed; nor was it intended to exempt from taxation the property of corporations other than those for pecuniary profits.

41 2. Same—Exemption of corporations—Sect. 13, art. 12, of State constitution construed.—Sect. 13, art. 12, of the State constitution does not declare that the property of all corporations for pecuniary profits shall be subjected to taxation, but that it shall be "subject" to taxation,—that is, liable to taxation. And it makes such property subject to "taxation the same as that of individuals;" so that, subject to the twentieth section of the same article, the legislature may at all times impose taxes on the property of such corporations, just as it may on the property of individuals. Sect. 13 fixes beyond legislative act the condition of

the property of such corporations as being liable to the exercise of the taxing power at the will of the legislature, and as subject to the same taxation that the property of individuals may be subjected to. The legislature may exempt property of a particular class, whether the owners be corporations or natural persons. But the property of corporations for pecuniary profits cannot be placed beyond the reach of the taxing power. It may not be taxed, but it must be ever liable. It need not be subjected, but it must always be "subject" to taxation, the same as that of individuals. The provision is mandatory as to the universal liability of such property to be taxed, but permissive to the legislature to tax it or exempt it, as may seem proper, in common with the property of individuals. Chalmers, J., dissented.

3. Same—Exemption—Sect. 20, art. 12, of State constitution construed.—Sect. 20, art. 12, of the State constitution provides that: "Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law." The first clause of this section establishes the rule of equality and uniformity as to taxation throughout the State, and the latter clause requires that all property shall be taxed in proportion to its value. The words "all property shall be taxed in proportion to its value" do not require that all property shall be taxed, and deny to the legislature the right to exempt any. The purpose of their employment is to fix the rule for taxation, and to protect against any taxation of property except in proportion to its value, to be ascertained as directed by law. This provision does not prohibit exemption. The legislature may exempt property of a certain class, or property used for a certain purpose. The legislature has the power to select such objects of taxation as they may deem appropriate; but when any article of property is selected for taxation, it must be taxed in proportion to its value, and not specifically.

4. Same—Exemption—Unconstitutional acts.—Any legislative act, whether a charter or other statute, the purpose of which is to exempt "the property of corporations for pecuniary profits," and to put it in a

condition where it will not be subject to taxation, is in conflict with sects. 13 and 20 of art. 12 of the constitution of this State, and, of course, confers no immunity against subsequent legislation. Chalmers, J., dissenting.

Appeal from the chancery court of Copiah county, Hon. E. G. Peyton, chancellor.

The appellant was incorporated by the legislature on the 13th of April, 1871, with the name of "The Mississippi
42 Mills," and for the purpose of manufacturing cotton and woolen fabrics, and all kinds of machinery. The incorporators at once organized, and the corporation proceeded to operate in accordance with the provisions of its charter. On the 1st of April, 1872, the following act of the legislature was approved:—

"An act to encourage the introduction of machinery and the establishment of factories in the State of Mississippi.

"SECT. 1. *Be it enacted by the legislature of the State of Mississippi*, That in consideration of the construction of factories, and the introduction of machinery for the purposes of erecting, furnishing and carrying on factories in this State, for the manufacture of cotton and woolen goods, or yarns, or fabrics composed of those or any other materials, and for the making of all kinds of machinery and implements of husbandry necessary for the cultivation of the soil, and to manufacture all other articles or things, of whatsoever character or description, not inconsistent with the laws and constitution of this State or of the United States, and of the great benefit which the State will receive in the development of its manufacturing resources by means of said factories, and the large and increased amounts of machinery and capital that will, by this liberal-spirited policy, be invited to the State, thus giving employment to and supplying the wants of thousands of our people, and also the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation on the people, the State hereby agrees with any and all manufacturing companies in this State, whose capital stock shall not be less

than ten thousand dollars paid in, not in operation before the passage of this act, that all taxes to which said company or companies shall be subject for the period of ten years are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which any of said companies may have incurred in the construction of factories, or the purchase of machinery, or paying debts incurred by any of said companies in constructing or purchasing the same; and it shall be the duty of the tax collectors in every county, in each and every year, for the period of ten years, to give to each of said companies a receipt in full for the amount of all said taxes due, upon receiving from each of said companies an affidavit, made by the president or treasurer of each of said com-
43 panies, that the amount of said taxes have actually, and in good faith, been paid and applied by each of said companies during the year, in payment of debts incurred, or money borrowed, as aforesaid; and which receipt, so given, shall be in full of all taxes, county, State, or municipal, to which said companies shall be subject; *Provided*, That whenever the profits of any of said companies shall enable it to declare and pay to its stockholders an annual dividend of four per cent. upon its capital stock, over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease towards such company or companies declaring said dividends, and said taxes shall be paid by such companies declaring such dividends, to the tax collector, to be by him paid over as required by law; *Provided further*, That nothing in this act contained shall be so construed as to exempt the property of any manufacturing or mechanical company from any tax levied by any county, city, or town, to meet the principal or interest on bonds issued by any such county, city, or town, to aid in the construction of railroads; and taxes thus levied and collected shall be applied to the payment of such bonds, and interest thereon.

"SECT. 2. *Be it further enacted*, That this act shall take effect and be in force from and after its passage."

The Mississippi Mills Company, having been "in operation before the passage of this act" of 1872, did not claim the benefit of its provisions. But, in 1873, all its buildings and machinery were destroyed by fire, and then the legisla-

ture passed an act, which was approved on the 17th of April, 1873, as follows:—

"An act to amend the provisions of an act entitled 'An act to encourage the introduction of machinery and the establishment of factories in the State of Mississippi.'

"SECT. 1. *Be it enacted by the legislature of the State of Mississippi*, That the provisions of an act entitled 'An act to encourage the introduction of machinery and the establishment of factories in the State of Mississippi,' approved April 1, 1872, be and they are hereby extended to the Mississippi Mills, in the county of Copiah, and that the provisions and benefits of this provision shall be a part of the charter of said company, and shall apply to each and every manufacturing department of the same; *Provided*, That the president, or some officer of said company, shall make the oath required by said act, and in all things comply with the provisions of said act.

"SECT. 2. *Be it further enacted*, That this act take effect and be in force from and after its passage."

In 1877, the following legislative act was passed and approved:

"An act to amend an act entitled 'An act to encourage the introduction of machinery and the establishment of factories in the State of Mississippi,' approved April 1, 1872, and to amend all acts extending the provisions thereof.

"SECT. 1. *Be it enacted by the legislature of the State of Mississippi*, That an act entitled 'An act to encourage the introduction of machinery and the establishment of factories in the State of Mississippi,' approved April 1, 1872, and all acts amendatory thereof, or acts extending the provisions thereof, be and the same is hereby so amended as not to exempt from taxation, State, county, or municipal, any property of any manufactory or manufacturing company, other than the paid-in capital stock of said companies, their machinery for manufacturing purposes, their manufactured goods, and the buildings in which their machinery is located, and the ground upon which buildings are situated, or which may be within the necessary inclosure around such buildings;

nor shall any tax to which any manufacturing company is or shall be subject on account of any other than the aforesaid description of property be appropriated or set apart for the benefit of said companies, or any of them; *Provided*, That all the property herein exempted shall become taxable and shall be assessed as other property, and the taxes thereon collected as on other property, whenever such property shall be used for any other than manufacturing purposes.

"SECT. 2. *Be it further enacted*, That the tax collectors of the several counties in which such manufacturing companies are situated, or may own property, shall, before giving to any such company any receipt for taxes, as provided in the said act of April 1, 1872, to which this (is) amendatory, collect from such company or manufacturer claiming the benefit of said acts, or either of them, an amount equal to the commissions of the assessor for assessing, and of the collector for collecting the tax on the property named in such tax receipt.

45 "SECT. 3. *Be it further enacted*, That such tax collectors shall pay over to the county treasurer of their counties the amount of the assessor's commissions so collected, and shall retain the tax collector's commissions so collected by him, as if the tax had been collected as other taxes are, and paid into the State and county treasuries.

"SECT. 4. *Be it further enacted*, That before any corporation or company shall receive the benefit of this act, the president or directors of such company or corporation shall take and subscribe an oath that the profits on the capital invested by such company or corporation, for manufacturing purposes, has not exceeded four per cent. per annum.

"SECT. 5. *Be it further enacted*, That this act take effect and be in force from and after its passage."

On the 4th of January, 1878, the Mississippi Mills Company filed a bill in chancery against W. W. Cook, tax collector of Copiah county, alleging that the acts of 1872 and 1873 constituted a contract with the complainant, *and that the act of 1877, which the tax collector threatened to execute by a sale of complainant's property, impaired the obligation of such contract, and was in violation of the Constitution of the United States.* The prayer of the bill was, that the tax collector and his successors be restrained, by injunction, from collecting the commissions or taxes allowed by the act of 1877, and

that they be compelled to execute the acts of 1872 and 1873. A temporary injunction was granted. The defendant filed a general demurrer to the bill. The chancellor sustained the demurrer, and the complainant appealed to this court.

Harris & George, for the appellant.

1. The power or capacity to make contracts generally, embracing the power to bind the State to forbear the exercise of particular powers, is an attribute of sovereignty, and is one of the great mass of powers belonging to the legislature; and by the Constitution of the United States these contracts are inviolable. 16 How. (U. S.) 369, 416. The legislature may favor particular enterprises or branches of industry by express exemption of the property employed in them from
46 taxation, or by merely omitting it from the scheme of taxation. The power to make this discrimination as to the subjects of taxation is an essential element of the taxing power, and enters into every intelligent system of revenue. Hence, sect. 20, art. 12, of the State constitution has been held not to restrict the legislature in the exercise of the power to select the subjects of taxation from the mass of taxable property, or to exempt from taxation the property employed in particular enterprises of public importance. This section requires taxation according to value, and excludes specific taxes, but does not require that all property shall be taxed in every revenue scheme. The exemption of property or money employed in manufactures of a particular kind is common. See Laws N. Y. and Me., 5 Greenl. 133; 4 Cow. 556.

2. Sect. 13, art. 12, of the State constitution, which forbids discrimination for or against corporations for profit, puts all property on the same footing, whether owned by individuals or corporations, and sect. 20, following, declares the rule as to all property; and these leave the legislature with power to grant, by contract, for an adequate consideration exemptions of property employed in a particular way, whether owned by individuals or corporations. The absence of any provision prohibiting such grants, or of any provision securing the right to repeal charters, leaving the legislature free to reserve or not, in such grants, the power to repeal or revoke them, would seem to forbid that we should attach to the thirteenth section a consequence so important as that

of disabling the legislature to make contracts respecting the taxing power. We find no provision directly prohibiting the legislature from making exemptions irrepealable. So important a limitation, if intended, would have been expressed in plain, unambiguous terms.

The constitution of Iowa has in it the thirteenth section, art. 12, of our constitution, but it has also a general provision reserving the right to repeal charters and every grant of privilege. The Constitution of Alabama declares that
47 charters shall be alterable at the will of the legislature. It also contains a provision similar to our thirteenth section of art. 12. It is plain that no irrepealable charters could be granted in these States, because the capacity to make binding contracts in charters of incorporation is taken away. The court in Alabama, and certain judges in Iowa, have held that this section was designed to prevent invidious exemptions of the property of corporations, even by an ordinary revenue law. In Alabama, the law condemned was one which made a discrimination of ninety per cent. in favor of the stock of a purely moneyed corporation. In Iowa, it was held that the law discriminated against individuals, by allowing a municipal corporation to tax them while it exempted the property of corporations. An exemption for a fair equivalent is not invidious. In the Iowa and Alabama laws there was no equivalent at all. The laws were, in their nature and under the constitution, subject to repeal. These decisions afford no warrant for giving to the thirteenth section of art. 12, standing alone in our constitution, the effect of all the provisions of the two constitutions to which we have referred. In this case we find no invidious exemption. It is a legislative proposition to everybody, for no one is denied the right to unite in the scheme sought to be fostered.

3. When a contract is made by the State, by charter or otherwise, by proposal offered and accepted, the courts deem the consideration adequate, when the offer or charter has been accepted, because the parties have been led to invest money or labor, or both, under the proposal. This is the distinction between a grant in a charter under which organization takes place, and a grant after the corporation is fully established, an exemption in the latter being regarded as a gratuity. Home of the Friendless *v.* Rouse, 8 Wall., 438.

4. The act of 1872 is not a charter granted. It is, in its terms,

an agreement by the State,—a proposal to persons generally. It is addressed to companies "not in operation" at the time of the passage of the act. The term "companies" can-
48 not be held to restrict the proposal to incorporated companies; but, if so intended, it opens the way to all persons to form such companies. The purpose of the act was, not to favor corporations, as such, but to promote manufactories in Mississippi, independent of the character of the owners. This act was repealable,—that is, the State was not bound to keep this proposal always before the country, and might, at any time, withdraw it; but as to those, whether incorporated companies or not, who had accepted the proposal, there was a vested right under the contract.

W. P. Harris, of counsel for the appellant, argued the case orally.

T. C. Catchings, attorney general, for the appellee.

1. Under section 20, art. 12, of our State constitution, taxation must be equal, uniform and ad valorem. It does not require all property to be taxed. The legislature may exempt property, either expressly or by not providing for its taxation. When exerted, however, the taxing power must be directed against all property alike, of the class selected for taxation. So, if property is exempted from taxation, all of that class must be exempted. Taxation must also be equal and ad valorem; hence what is known as a commutation tax is prohibited, for such taxation would be neither equal nor ad valorem. O'Kane *v.* Treat, 25 Ill. 561; Hunsaker *v.* Wright, 30 Ill. 148; 11 Wis. 37; Franklin Ins. Co. *v.* The State, 5 W. Va. 349; 38 Ind. 7; Zanesville *v.* Auditor, 5 Ohio St. 592; Exchange Bank *v.* Hines, 3 Ohio St. 15.

The property of A. cannot be exempted, and at the same time that of B. and C., of the same class, be taxed, for that would be neither equal nor uniform taxation; the property of A. cannot be taxed by one mode, and that of B. and C. by another, for that would not be equal taxation; it is not admissible to donate to A. the taxes assessed against his property, and at the same time to compel the payment of those assessed against the property of B. and C., for that would be doing indirectly

what cannot be done directly; and A. could not be
49 released from taxation, in whole or in part, because of supposed benefits therefrom to accrue to the public; for taxation, to be equal and uniform, must be laid in the same mode and to the same extent upon every particle of property of the class or classes selected for taxation. As the practice of commuting taxes is prohibited, a law exempting property from taxation, whether because of supposed public benefits to accrue, or otherwise, would be without consideration, and repealable at pleasure. *Salt Co. v. East Saginaw, 13 Wall. 376;* Columbia Mfg. Co. *v.* Vanderpool, 4 Cow. 556. Therefore, it follows, even if there was no other constitutional provision than sect. 20, that the legislature can only lay taxes ad valorem, and cannot part, either with or without a consideration, with its power to tax any and all property in the State, at pleasure. And there is no difference, in this respect, between corporations and individuals.

2. Sect. 13 of art. 12 of the State constitution was not intended to confer the power to tax the property of corporations, for the legislature already had that power; nor was it intended to protect corporations from invidious discriminations, for that protection was already afforded by sect. 20; and it was not intended to require that the property of corporations should at all times be taxed, for that would be to prohibit exemptions at all, inasmuch as it would not be allowed to tax the property of corporations, and at the same time to exempt similar property of individuals. It was designed to place the property of corporations for pecuniary profits upon the same footing as that of individuals. A law granting immunity from taxation is a mere act of bounty, and repealable at pleasure; but where the immunity is conferred by the act of incorporation, or an amendment thereto based upon a new consideration, the immunity rests upon a contract, and is a vested right. The distinction is obvious when we consider the difference in the sources of power from which the two kinds of exemption spring. The one comes from the power to regulate taxation; the other
from the power to create corporations. The latter
50 pertains to sovereignty. This sovereign power, if unrestricted, might grant immunity from taxation, in a charter of incorporation; and if the charter should be accepted and acted on, the grant would rest upon a contract, and be protected from legislative interference. Sect. 13 was

designed to limit this power, so that the legislature could not grant immunity from taxation. As to corporations not for pecuniary profits, there is no limitation.

Upon the whole, my conclusion is that there can be no irrevocable exemption of property, whether of individuals, or corporations for pecuniary profits; that the property of both must forever remain subject to taxation, whenever the legislature chooses to impose it; that the taxation of both must be by an equal and uniform rate; and that all taxation must be laid according to value.

L. O. Bridewell, on the same side, filed a lengthy and elaborate brief, arguing the case fully, and citing upon the point as to the unconstitutionality of the acts of 1872 and 1873, and the effect of sects. 13 and 20 of art. 12 of the State constitution, the following authorities: Ohio Life Ins. Co. *v.* Debolt, 16 How. 431; Zanesville *v.* Richards, 5 Ohio St. 243; Hill *v.* Higdon, 5 Ohio St. 589; The People *v.* McCreery, 34 Cal. 43; 5 Wall. 107; 28 Miss. 213.

T. C. Catchings, attorney general, and L. O. Bridewell, also argued the case orally.

The judges delivered opinions seriatim.

CAMPBELL, *J.*:

This case presents the question whether, under the constitution of this State, adopted on the 1st December, 1869, it is within the power of the legislature to grant to a corporation for pecuniary profit exemption from the taxation of its property, so as to free it from liability to be taxed during the time for which such immunity may have been granted.

The language of sect. 13, art. 12, of the constitution is,
51 "The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals;" and that of sect. 20 of the same article is, "Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

It was not intended by sect. 13 to confer power on the legislature to tax the property of corporations of the class mentioned. That existed, without this section, as an inherent legislative power.

It could not have been intended by this provision to require the taxation of the property of corporations whose

charters, previously granted, secured them exemption from taxation; for this was beyond the power of the framers of the Constitution, and of the people in adopting it, as repeatedly declared by the Supreme Court of the United States in reference to that clause of the Constitution of the United States which forbids any State from passing any law impairing the obligation of contracts.

It is not to be supposed that it was designed by this provision to fetter legislative discretion by an inflexible rule that the property of all corporations for pecuniary profit must always be taxed.

It cannot be said that this section intended to exempt from taxation the property of corporations other than those for pecuniary profit.

The language of sect. 13 is peculiar, and we have no other guide for its interpretation except its terms. No other provision of the Constitution sheds any light on this, whose meaning must be ascertained from the fair import of the words employed. There is no difficulty in determining the meaning of the words "the property of all corporations for pecuniary profits." In the language of grammar, that is the subject in the sentence, being that of which something is affirmed; and that which is affirmed of it is, that it "shall be subject to taxation, the same as that of individuals." An analysis of this predicate will show an affirmation that its subject, viz: the property of all corporations for pecuniary profits, "shall be
52 subject to taxation," and of a certain kind, viz., "the same as that of individuals." It is not declared that the property of the corporations mentioned shall be "subjected," but "shall be subject to taxation,"—that is, shall be liable to taxation. "The property of all corporations for pecuniary profits shall be subject to taxation;" but how? The answer is, "the same as that of individuals." The liability of the property of all corporations for pecuniary profit to taxation is thus secured by the fundamental law, and it is to be "the same as that of individuals." The language is not, shall be subject to the same taxation, but to "taxation the same as," etc. If the language as used is equivalent to "the same taxation as that of individuals," it must nevertheless be held that its object and effect were to fix the sort of taxation to which the property of all corporations should be subject, and not to affect the condition of

being subject to taxation. The peculiar arrangement of the words, "the same as," suggests as possibly within the contemplation of the framers of the constitution this view, viz.; the property of all corporations for pecuniary profit shall be subject to taxation, just as the property of individuals is. That of individuals is liable to taxation. They have not been granted immunity from taxation. Their property is subject to taxation, and so, in like manner, the property of all corporations for pecuniary profit shall be liable to taxation.

The import and purpose of sect. 13 seem to have been to establish the condition of the property of all corporations for pecuniary profit as being subject to taxation, and to forbid the exemption of such property from the liability to be taxed, by placing the property of all corporations for pecuniary profit, the same as that of individuals (natural persons), completely within the legislative power for the purpose of taxation, subject to the twentieth section of the same article of the constitution; so that the legislature may at all times impose taxes on the property of such corporations, just as it may on the property of individuals. The provision is mandatory, not that the property of corporations shall be taxed (that is left to the legislature), but such property shall ever be subject—*i. e.*,
53 liable—to be taxed, if the legislature so wills. Such property shall not be freed from liability to taxation, but shall always be liable to be taxed, just as the property of individuals is so liable. The "same as" are words of comparison. If such corporate property is placed beyond the reach of the taxing power, it is not subject to taxation. The constitution says it shall be "subject to taxation, the same as that of individuals;" *and the legislative act, whether it be a charter or other form of law, which says it shall be exempt, and not subject to taxation, is in conflict with the constitution;* and none will contend that a charter which contains provisions violative of the constitution confers any right wherein the conflict is.

This section of our constitution is copied from the constitution of Iowa, where it has been held by a majority of the court that it is not constitutional for the legislature to exempt the property of corporations from the same taxes imposed on the property of individuals, and that the property of corporations must be taxed when that of individuals is taxed.

City of Davenport *v.* Railroad Co., 38 Iowa, 635; City of Dubuque *v.* Illinois Central R. Co., 39 Iowa, 56. In these cases, Cole, J., dissented, holding the view that the constitutional provision is permissive, and not mandatory.

The constitution of Alabama of 1868 has a provision nearly like the thirteenth section of art. 12 of ours, and it has been interpreted by the supreme court of that State to prohibit the legislature from discriminating, in a revenue law, in favor of a corporate property, so as to free it from bearing the same taxation which is imposed on individual property. Mobile *v.* Stonewall Ins. Co., 53 Ala. 570. In this case, it is said by the court that the provision was "added, in itself self-executing, without the aid, in fact in restraint, of legislative power, subjecting corporate property to the taxation imposed on individuals;" and it is announced in that opinion that "if property of a particular kind is subjected to taxation, and owned by a corporation, it must bear the rate of taxation imposed on individuals."

54 The principle upon which the cases in Iowa and Alabama rest is, that the constitutional provision under consideration is mandatory to the legislature, requiring it to impose upon the property of all corporations for pecuniary profit the same taxation as that imposed on the property of individuals; and, therefore, that it is unconstitutional for the legislature, in adopting a revenue law, to withdraw property of such corporations from the operation of it, so as to relieve them in any way from the same taxation imposed on the property of individuals. If the legislature cannot, by a general revenue law, discriminate in any degree in favor of property of corporations, forbidden because it is owned by them, how can it be claimed that it can, by a particular act of incorporation, secure in advance to the corporation absolute immunity from taxation of all kinds, beyond the reach of legislative recall or interference? If corporate property must be taxed the same as individual property, and the legislature cannot omit to tax it when it taxes individual property; if the constitutional provision is self-executing, and *per se* subjects corporate property to the same taxation as individual property, as held by the courts of Iowa and Alabama, it is plain that the legislature cannot thwart the constitutional requirement by the easy process of chartering corporations beyond the reach of the constitutional provision. If a corporation escapes taxation by virtue

of a legislative act, it is not "subject to taxation," whereas the constitution says it shall be, and thus a legislative act of incorporation is made to annul the constitution. It is said that corporate property must be taxed when individual property is; but how can that be, if corporate property is secure in immunity from taxation by virtue of a legislative grant?

The true view is that this provision of the constitution fixes, beyond legislative act, the condition of the property of all corporations for pecuniary profit as being always liable to the exercise of the taxing power, so as to subject it, at the will of the legislature, to the same taxation as the property of individuals may be subjected to. *The legislature may exempt*
55 *property of a certain class, whether the owners be corporations or natural persons, but corporate property shall never be placed beyond the reach of the taxing power.* It may not be taxed, but it must be ever liable. It need not be "subjected," but it must always be "subject," to taxation, the same as that of individuals, for the constitution so declares. The provision is mandatory as to universal liability to be taxed, but permissive to the legislature to tax the property of such corporations, or exempt it, as it may see proper, in common with the property of individuals, which may be taxed, or not, for the time being.

Sect. 12, art. 12, of our constitution prohibits the creation of corporations with certain privileges therein enumerated; and then follows immediately sect. 13, which declares that "the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals." It is thus suggested that the thought of the framers of the constitution was, to forbid the creation of corporations with certain privileges, and, leaving the legislature free from restriction as to the powers it should confer on corporations, except as inhibited by the twelfth section, by the thirteenth section to declare the liability to taxation, the same as that of individuals, of the property of all corporations for pecuniary profit. Sect. 14 of the same article prohibits the authorization of any county, city, or town to become a stockholder in any company, association, or corporation, except upon a condition prescribed in it.

It is thus seen that sect. 13 is in the midst of restrictions upon legislative power as to corporations, and its association strengthens the idea its terms import. *Noscitur a sociis.*

Certain corporate privileges are absolutely forbidden by sect. 12. The liability of corporate bodies to taxation the same as that of individuals is fixed by sect. 13, and the restriction of sect. 14 completes the constitutional safeguards as to corporations. This section stands as a barrier to any legislative act whereby to make the property of corporations for pecuniary profit not "subject to taxation the same as that of individuals." It sprang from the experience that corporations were in the habit of asking and obtaining legislative exemption from liability to taxation, and it was intended to establish the inflexible rule of being "subject to the same taxation" that the property of individuals is, but leaving the legislature free to tax the property of corporations or not, on the same principle on which it may or may not tax that of individuals.

The fact that our constitution does not contain a provision against irrepealable charters argues nothing against the foregoing views. The Alabama court did not find in the provision of the constitution of that State, like the thirteenth section of art. 12 of ours, the intention to reserve to the legislature the power to subject corporate property to taxation at all times, because it said that purpose was accomplished by another section of their constitution, and that this section was added to preclude the possibility of even a temporary exemption of corporate property from taxation. Undoubtedly, if under this section there could not be a temporary exemption, it would be absurd to say there could be a perpetual exemption by charter.

The first clause of sect. 20 establishes the rule of equality and uniformity throughout the State in taxation, and the other requires that all property shall be taxed in proportion to its value, to be ascertained as directed by law. This fixes the principle by which property shall be taxed, and leaves the legislature free to tax other things than property, as it may deem to be best, subject only to the rule of equality and uniformity as declared by the first part of the section. The words "all property shall be taxed in proportion to its value" do not require that all property shall be taxed, and deny to the legislature the right to exempt any. The purpose of their employment is to fix the rule for the taxation of property. Before the adoption of the present constitution, the power and the practice ex-

isted to tax property without regard to value. The
57 intent of this provision was to protect against the taxation of property except in proportion to its value, to be ascertained as directed by law. The ad valorem rule in taxing property is secured, and the ascertainment of this value, as directed by law, is made necessary, so that the proportion to its value may be borne in the matter of taxation of property. If the purpose had been to prohibit exemptions from taxation, it would have been declared in unmistakable terms. It was easy to declare that the legislature shall not exempt any property from taxation. The omission of such a provision makes it certain that no such prohibition was thought of.

The constitution of Missouri contained the provision that "all property subject to taxation in this State shall be taxed in proportion to its value;" and in The State *v.* North *et al.*, 27 Mo. 464, the judge delivering the opinion of the court said this provision "has been repeatedly construed by this court to mean, not that all the property in the State must be taxed, but that when any article of property is selected for taxation, it shall be taxed in proportion to its value, and not specifically." This view had been distinctly announced in Hamilton *et al. v.* St. Louis County Court, 15 Mo. 3. It is true that there seems to be a different view announced in a very singular opinion of the majority of the court, in Crow *et al. v.* The State, 14 Mo. 237; but the opinion of Napton, J., in that case, is convincing in favor of the opposite view, and which, as seen subsequently, became firmly established in that State. He says: "I understand this provision of our constitution to be simply designed as an injunction upon the legislature to lay ad valorem taxes upon such property as may be selected for taxation. It does not prohibit exemption or discrimination; it does not deny to the legislature the right to select such objects of taxation as they may deem most appropriate. * * * The legislature cannot make a law declaring that my horse, which is worth fifty dollars, shall pay the same tax with my neighbor's, which is worth one hundred. This would be a specific tax upon horses, without reference to their value. But they may decline
58 to tax, or exempt from taxation, all horses under a certain age, or all horses of a particular breed."

The constitution of California contained these words, viz.: "All property in this State shall be taxed in proportion to its value."

In The People *v.* Coleman, 4 Cal. 46, it was held, in a well-reasoned opinion, "that the legislature may select or exempt such property as in its discretion it may think proper," for taxation. This ruling was followed in High *v.* Shoemaker, 22 Cal. 363. It is true that these cases were, as to this, overruled in The People *v.* McCreery, 34 Cal. 432, and that subsequent cases have followed the last-named case; but we consider the view held in the earlier cases named the sounder one, and certainly as that with which, if any, the framers of our constitution were acquainted, because the case of The People *v.* McCreery was finally decided at the January term, 1868, of the supreme court of California, and was subsequently published in the volume of cases, and it is highly improbable that a knowledge of the new doctrine of the California court had become generally diffused. If, therefore, in borrowing this provision from the constitution of California, it is to be held that we took it with the settled judicial construction placed upon it, the inference is a just one that the makers of the constitution had in view the construction adopted in The People *v.* Coleman and High *v.* Shoemaker, *ut supra*, and which had been published for years, and acquiesced in by the courts and people of California until the time of the case in 34 Cal.

The constitution of Arkansas required laws to be passed taxing all real and personal property, enumerating certain things not to be taxed, and providing that "the General Assembly may exempt from taxation personal property to the value of five hundred dollars to each tax-payer." Of course, under this it was held that the legislature could not exempt other property than that embraced in the power to exempt. *Expressio unius, exclusio alterius.* Fletcher *v.* Oliver, 25 Ark. 289. And on examining the constitution of those States
59 whose courts deny the right of the legislature to exempt anything from taxation, it will be found that this view results from an unmistakable requirement by the constitution that everything shall be taxed, except as to the court of California, of which we have already spoken.

It follows from these views, that it was competent for the legislature to modify or repeal the act of April 1, 1872, and that the act of February 1, 1877 (Sess. Acts, 72), is constitutional, and that the bill of complaint is not maintainable.

Decree affirmed.

SIMRALL, *C. J.*:

The primary and general question for discussion and decision is the meaning and effect of the thirteenth and twentieth sections of the twelfth article of the constitution. What is the meaning and for what purposes were the thirteenth and twentieth sections of the twelfth article of the constitution adopted?

The taxing power pertains to the State as a sovereignty. It vests in the legislature, to which, in general terms, is committed the legislative power. See sect. 1 of art. 4. These sections were not in the constitution of 1817 nor 1832, yet the authority of the legislature under these constitutions to tax was plenary.

The sections not being necessary to confer power, must have been devised to regulate, control, or limit the power.

The twentieth section prescribes a plan, or rule, in accordance with which all laws imposing taxes must be framed. If the burden is imposed on property, the tax shall be in proportion to the value, and a scheme must be devised by which the value shall be ascertained. That idea is distinctly conveyed by the words, "according to its value, to be ascertained as directed by law." The entire clause reads, "All property shall be taxed in proportion to its value, to be ascertained as directed by law."

The ad valorem principle is the rule applicable to
60 property. What does the other clause of the section mean?—"Taxation shall be equal and uniform throughout the State." Certainly it intends that the rate shall be the same in every county and locality. There shall be no discrimination in one part of the State against another.

If the tax be on cattle or horses, that species of property must be taxed in all parts of the State, and the rate must be the same everywhere.

The injunction to the legislature is, that when it undertakes to tax property and has selected the subjects on which the burden shall be imposed, it must be laid on a valuation, and not on the acreage, for instance, and the per centum of the tax must be the same in all localities, and must be uniform; that is, all persons, owners of the same sort of property, must bear equally the burden.

The section does not necessarily require that all property in the State at the time of the assessment must be taxed. It

does not take away from the legislature the discretion to select the subjects. But when the selection is made, all property of that sort must bear its proportional part of the burden.

I turn now to the thirteenth section, and will treat it in the same method as the twentieth section. A close analysis of the language discovers a distinction between the different kinds of corporations. The convention excluded altogether those corporate bodies purely eleemosynary, whose chief object is to dispense benefits to the public, rather than make profit for their founders,—such as asylums for the sick, aged, or orphans; institutions of learning, and to promote Christianity, etc.

The purpose of the exclusion was, not to negative the power to tax them, but to leave them as they were before, and as they would have been without this section. In the legislative history of the State, such corporations never had been taxed. It seemed to have been the settled policy that they should not be. The convention left these charitable and eleemosynary bodies corporate in possession of their traditional immunity. It simply declined to make any rule respecting them.

61 The omission (purposely) of these bodies from the section gives force to the view already advanced, that there is nothing in the twentieth section, nor elsewhere in the constitution, imperative on the legislature to tax all property and exempt none. For it is manifest that these corporations were left out of the thirteenth section so that they might continue to enjoy the legislative exemption or pretermission from taxation. The idea embodied is, that whilst the property of corporations for profit shall be subject to taxation, there is a distinction between them and those bodies associated under charters to teach the Christian religion, to promote education, or provide asylums for the sick and destitute; these institutions are founded to dispense benefits to society, and not to those who establish them.

Pursuing further the analysis of the language, it will be observed that the sentence is constructed in the imperative mood,—shall be subject to taxation.

The words are mandatory, and are perpetually addressed to the legislature, the department of government charged with the duty and the power to tax. The command is, "Do nothing, refrain from any act or law, by which the property

of bodies politic, for profit, shall be loosed or acquitted from continuous subjectibility to taxation."

The next thing to be noticed is the import of the word "subject"—"subject to;" not that the taxes must be laid in all circumstances, and at all times; not, indeed, that they must be imposed at all, but that the property of those bodies shall be subject to taxation, as the legislature in its wisdom and discretion shall order.

The complete text is, "The property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals."

"The same as that of individuals," as prescribed in the twentieth section, on the plan of "equality," "uniformity," and "valuation." The corporation shall pay no more, no less, than individuals. There shall be no discrimination or invidious distinction. If that were the whole import of the section, it would be utterly meaningless and useless. It would have no distinctive value or purpose, and might just as well have been left out of the constitution. To come to that conclusion, we must imputte folly to the convention.

62

As already remarked, it did not require a grant of power to tax corporate property; and neither this section nor the twentieth were inserted in the instrument on any such idea, or for any such purpose.

Under the twentieth section, the legislature is obliged, if it taxes the property of corporations for profit, to tax the same as it taxes individual property. If it did not, the law would infract the rules of "equality," "uniformity," and "ad valorem" there prescribed.

If the legislature conformed to those rules (which to it are the supreme law), it is impossible that corporate property could be taxed higher, or in any other way, than similar individual property. The legislature is prohibited to enact an unjust, unequal, and discriminating law.

We must find some other motive for the thirteenth section than to accomplish something already secured by another section. That purpose is, the very important mandate that the property of corporations for gain shall be subject to taxation like that of individuals. It is mandatory in this: that nothing shall be done, or can be done, which shall withdraw it from perpetual liability to taxation.

If the thirteenth section is obeyed, the legislature cannot,

in any form of statute, take from the corporate property its liability to taxation. It cannot, by an act of incorporation, in view of the prospective benefits of the enterprise of the corporation, bind a future legislature so that it may not judge of the fitness and propriety of requiring the corporate property to share in part the public burden. *If the exemption is granted in the form of a contract in the charter, that is prohibited.*

63 This section was first adopted in this State in 1869; it is of modern origin in any of the American constitutions. It is plainly the lesson of history,—as much so as any of the great principles taken from Magna Charta. It grew out of the enormous aggregations of capital associated under common control to make gain for the proprietors, which have had in modern years such stupendous development in the railroad, mining, banking, manufacturing, and navigation corporations; and the habit of the legislature of this and other States, to stipulate an exemption from taxation perpetually, or for a limited time, or until a certain profit was made. The exemption was granted on the consideration that these great enterprises would aid to develop the industries of the State and increase its population. We had in this State no history, nor elsewhere, of the exemption of individuals, and no mischief, real or supposed, growing out of such exemption. There was, however, much experience, here and elsewhere, of the exemption of corporations such as I have named.

The thirteenth section contains no idea of hostility or repression towards corporations for profit. It gives no hint of a policy of discouragement. It contains no rebuke of legislation which pretermits from taxation the corporate property of an association struggling into existence. If the legislature should determine that it was wise and for the general good to pretermit the taxation of all property employed in the manufacture of cotton and woolen cloths, or agricultural implements, or household furniture, as a means to encourage investments in these enterprises, there is nothing in the thirteenth section, or combined with the twentieth, which would prevent it. The exemption would be on account of the nature of the property and the use to which it is put. The exemption of a church edifice, of a college, or a hospital, is because of the use to which the property is put. In these instances the property is of a

mixed nature, both realty and personalty. So, if the legislature, from a motive to promote domestic industries, choose to exempt—that is, refrain from taxing—
cotton or woolen factories, or plow or furniture fac-
64 tories, whether owned by joint-stock companies, corporate bodies, or individuals, it could do so. In such cases, in selecting the subjects of taxation, it passes by those sorts of property, or property put to a particular use. But distinction in the selection of the subjects cannot be made because the property belongs to a corporation or individuals, nor because the owners are poor or wealthy. If the exemption is because of the use, as in manufacturing, it must extend to the like property of individuals.

The struggle was long and arduous before the Supreme Court of the United States announced that a State, by an act of incorporation, could cede away for a time, or perpetually, the power to tax corporate property. A minority of the judges, as often as the question was presented, denied that such a grant in the charter was protected by the Federal Constitution, on the ground that the State could not, in that form of contract, denude itself of one of its sovereign powers, so necessary for its self-preservation.

The State courts have never cheerfully yielded their assent to this doctrine. The time, perhaps, will come when the Supreme Court of the United States will recede from it. The necessity of the preservation of the taxing power in its integrity had, perhaps, much to do in the adoption of the thirteenth section. It is wiser and safer, when we consider that the State lives on after successive generations have passed away, to leave to each legislature, in time to come, to judge for itself upon what persons and things taxes shall be laid, rather than that a legislature of today may declare that certain property, belonging to certain owners, and future accumulations to it, shall for a long term of years, or forever, be exempt from such impositions.

The constitution commits that entire subject to each legislature, when it comes to act on the subject, with the single restriction that, if taxes are imposed on manufacturing property (for illustration) owned by individuals, the like tax shall be
paid by corporations; but if the legislature, from
65 considerations of policy, exempts property because of its use and the purpose for which it is employed, the exemption cannot be given to the corporation as owner,

whilst the individual owner is required to pay the tax. That would not be equal or uniform.

There is no limitation on the power of the legislature to incorporate railroad, manufacturing, or other like corporations, and the grant of all the franchises usual and necessary to the complete and orderly performance and conduct of the several businesses and enterprises, except that the legisature cannot grant them an immunity from taxation. The legisature is prohibited by the constitution from making that contract with the corporations.

It is hardly necessary to say that these views do not apply to such charter exemptions granted before the present constitution went into effect, if such exemption was irrevocable or irrepealable when granted.

I have read the cases cited from Iowa, California, and Alabama, and do not entirely agree, in the reasoning, with any one of them; nor are these cases harmonious with each other.

The courts of the States having similar constitutional provisions do not seem to have given full and exhaustive deliberation to the subject; and, perhaps, have not reached a conclusion which will be accepted as a finality.

In the contrariety of views which they have expressed, I do not attach any more weight to their decisions than the reasoning is intrinsically worth. The subject is so new that it presents itself in this court as "*res integra*," and it ought to receive such solution as is approved by the reason and judgment of the members of the court.

CHALMERS, *J.*, dissenting:

As a citizen, I regard the construction placed by my associates on the constitution as most fortunate for the interests of the State; as a judge, I cannot see that it is warranted by the language of the instrument. It is the settled doc-
66 trine of the Supreme Court of the United States that a State legislature, if not prohibited by the local constitution, may contract away the taxing power of the State in consideration of public benefits to be derived from a particular enterprise; and that the law by which such a result is accomplished becomes, when passed, irrepealable, except by the consent of the persons in interest.

However erroneous I may regard such a doctrine, I am bound by my oath of office to observe and enforce it, until

that court which is upon these questions the supreme judicial arbiter shall recede from their own decisions.

The inherent power, then, exists in the legislature of this State, by charter or contract to exempt in perpetuity, or for a term of years, the property of individuals or of corporations, unless there is something in our constitution to inhibit such contracts; and the contract or charter, when made and accepted, is irrepealable. The right to contract away the taxing power of the State exists, unless expressly prohibited.

Let us look for the prohibition.

Two clauses of the constitution only have any possible bearing on the question, to wit, the thirteenth and twentieth sections of art. 12.

"SECT. 13. The property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals."

"SECT. 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

Sect. 13 plainly prescribes the same rule of taxation with regard to corporate property that is applicable or may be applied to the property of individuals. It prohibits any discrimination between the two classes of property. It declares that the property of corporations shall be liable or subject to taxation, the same as that of individuals. It thereby compels as against such property a rule as rigorous, and
67 prohibits in favor of such property a rule more rigorous, than that which is or may be applied to individual property. It is therefore both mandatory and inhibitory,—mandatory in the requirement that the rule of taxation shall be as onerous, inhibitory in the declaration that it shall not be more so. If it stood alone, if there was not elsewhere in the instrument some limitation upon legislative power with regard to the taxation of individual property, this section would have no other force or effect than that of establishing a uniform rule between the two classes of property, and that rule would be wholly determinable by the legislative will, except that it could not vary when applied to the different classes.

In all other respects it would be left wholly to legislative wisdom.

Turning to the twentieth section, however, we find certain

rules prescribed for the imposition of all taxes; and here, therefore, we discover those limitations upon the taxation of the property of individuals which the thirteenth section declares shall be applicable alike to the property of corporations for pecuniary profits.

The thirteenth section, therefore, is to be read in connection with the twentieth, and can have no complete and perfect interpretation until the meaning of the twentieth section is ascertained.

Whatever rate or rule of taxation may be adopted under the one, may be adopted under the other. Whatever exemption may be granted under the one, may be granted under the other. Whatever contract may be made with reference to individual property under the twentieth section, may be made in reference to corporate property under the thirteenth. Similarity of taxation necessarily implies similarity of exemption.

We all concur in holding that the twentieth section does not require the taxation of all the property in the State, but only that all that is taxed shall be taxed uniformly, equally, and according to value. These are the three rules, and the only rules, laid down with reference to taxing the
68 property of individuals. What do they mean? The requirement of uniformity means that all property belonging to the same class shall be taxed alike; so that all horses shall be taxed at the same rate, and all lands, or stocks, or merchandise. There is to be no discrimination between property of the same class; and it shall not be competent to levy one rate upon country lands and another upon city lands, or one rate upon horses of one breed and another upon horses of a different breed.

If the uniformity requirement stood alone, it would be competent to affix different rates to different kinds of property, and so to impose one rate on all lands, and another on all horses, and still another on all stocks, and still another on all merchandise. But this kind of discrimination is prohibited by the requirement of equality, by which it is made obligatory that the same rate shall be imposed on every kind and species of property that is subjected to taxation. This is the practical construction which has, by successive legislatures, been placed on these words, and I think it the true one. The clause requiring ad valorem taxation needs no explanation.

It is quite manifest that there is nothing in these requirements of uniformity and equality, and of ad valorem taxation, which in the slightest degree militates against that inherent right to contract away the taxing power which the Supreme Court of the United States declares to reside in every State legislature, unless restricted by the organic law.

If a proposition so plain needed to be strengthened, its correctness is placed beyond controversy by the fact that clauses substantially similar to our twentieth section are found in the constitutions of perhaps a third of the States of the Union; but in none of them has it been held that their effect was to forbid such contracts or charters.

My colleagues concede this. They admit that there is nothing in the constitution to prohibit an irrepealable exemption, by contract, of the property of individuals. They admit that under the settled doctrine of the Supreme Court of the United States we would be compelled to uphold such a contract, if made with reference to the
69 property of an individual. They confess their inability to discover any prohibition of such power of exemption in sect. 20. It follows, therefore, that said section contains an implied recognition of legislative power to make such contracts.

With this admitted and conceded interpretation of sect. 20, let us write out the two sections in full, giving sect. 13 literally, and giving sect. 20 as we have now ascertained its true meaning to be:

"SECT. 13. The property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals."

"SECT. 20. Taxation shall be equal and uniform throughout the State. All property that is taxed shall be taxed in proportion to its value, to be ascertained as directed by law. The legislature may, by contract, in consideration of public benefits, exempt property from taxation, and such exemptions shall be irrepealable during the terms for which they are granted."

This rendering of sect. 20 must be admitted to be legitimate, since this meaning to its language is conceded to be the one which, under the decisions of the Supreme Court of the United States, we are bound to adopt.

How it is possible, with the two sections thus written, to deduce from sect. 13 a prohibition of chartered exemptions

as to corporate property, I am wholly unable to perceive. Conceding that the exemption is permissible under the one section, I am at a loss to see how it is inhibited by the other.

I find no such magic as my colleagues in the words, "shall be subject to taxation, the same as that of individuals." To me they have no meaning, other than that which would be conveyed by the equivalent phrases, "shall be viewed in the matter of taxation;" or, "shall be treated;" or, "shall be dealt with;" "the same as that of individuals." These, and many similar phrases which might perhaps be suggested, all convey but one and the same idea, namely, that
70 the law-giver, in the imposition of taxes, shall know no difference between the property of individuals and that of corporations for pecuniary profits. Alike they shall be taxed equally, uniformly, and ad valorem; alike they may be made the subject of a contract of exemption, which, when made, shall be irrepealable. It is said that the injunction is, that the property of corporations "shall be subject to taxation;" that this means that it shall ever be kept subject, and hence it can never be so dealt with that it will not be subject. If the sentence simply was, that "the property of all corporations for pecuniary profits shall be subject to taxation," it is possible that it might bear this construction, though it would be a most lame and inadequate method of expressing the idea. But the injunction is not that it shall be subject, or shall be kept subject, to taxation, but that it shall be subject "the same as that of individuals." Hence it follows that whatever may be done with reference to individual property may be done with reference to it.

There is no violation of the constitution until some law has been enacted in regard to it which would be invalid if applied to individual property. It cannot be taxed otherwise than uniformly and equally and ad valorem, because the property of individuals cannot be so taxed. It may be the subject of an irrepealable contract of exemption, because the property of individuals may be.

It "shall be subject to taxation the same as that of individuals." How is that of individuals subject? In subordination to the legislative right to exempt by contract. So, therefore, corporate property must be subject, also, in subordination to the right of exemption by contract or charter. The constitutional injunction that the subjectibility shall be the same is violated whenever a different rule is applied,

either to the imposition of, or the exemption from, taxation, because the rule of similarity tolerates no distinction as to either.

It is said that the framers of the constitution desired
71 to prohibit the perpetual exemption of corporate property, because that was a great evil of which they had practical knowledge; but they did not care to extend the prohibition to the property of individuals, because such exemptions, either in perpetuity or for a term of years, were unknown in American legislation. This might have afforded an excellent argument, in the constitutional convention, for making the distinction between the two sorts of property, but is worthless as showing that, in point of fact, such distinction was made.

But is it not remarkable that if the makers of the constitution had an idea so wise, so well defined, so beneficent, they could find no appropriate words in which to express it? Since the case of Knoop *v.* Bank of Ohio, 16 How. 376, there has been a persistent struggle, both in the State and Federal courts, over this claim that one legislature could, by contract or charter, so cede away the power of taxation as to fetter the hands of their successors. Many of the ablest jurists on the Federal bench, and a majority, perhaps, of the State courts, have questioned or denied it. If this was the idea which the framers of our constitution wished to set at rest, how easy would it have been to have declared in a single line that all charters should be repealable, or that there should be no chartered exemption from taxation of corporate property. It seems scarcely respectful to the givers of the organic law to suppose that, with ideas so well defined, they should have couched them in language which can only be understood by the most labored construction.

But they seem to have been men who had no difficulty, ordinarily, in expressing their meaning. Our constitution abounds with short, nervous, pithy sentences, which leave no doubt in the mind of the reader what it is that they intend to forbid or to sanction.

The thirteenth section of our constitution is borrowed from that of Iowa, and has been twice considered by the supreme court of that State. The exact question here presented
72 was not involved, but in the several opinions delivered there is no hint that the section was intended to prohibit contract exemptions from taxation. The section is

found also, somewhat broadened, in the constitution of Alabama; and in the single deliverance which has been made upon it in that State, there is a distinct declaration that it was not intended to accomplish such a result. City of Davenport *v.* Railroad Co., 38 Iowa, 633; City of Dubuque *v.* Illinois Central R. Co., 39 Iowa, 56; City of Mobile *v.* Stonewall Ins. Co., 53 Ala., 570.

Both the constitution of Iowa and that of Alabama, in addition to this section making the property of corporations for pecuniary profits subject to taxation the same as that of individuals, contain, also, clauses declaring all charters repealable.

The framers of our constitution adopted the section with reference to the subjectibility to taxation of corporate property, and omitted the one making charters repealable. This, it seems to me, settles the question, and demonstrates that while they desired unmistakably to place individual and corporate property on the same footing as to taxation, they did not propose in any manner to interfere with that inherent legislative right to contract away the taxing power which the Supreme Court of the United States had for years before the making of our constitution repeatedly declared to exist, except where denied by the organic law.